

Rainbow Bay Sdn Bhd v MLGH (Sabah) Sdn Bhd & Anor

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HIGH COURT (KOTA KINABALU) — SUIT NO BKI-22NCvC-11/2 OF
2016 (HC1)

MAIRIN IDANG J

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18 NOVEMBER 2020

*Contract — Agreement — Joint venture and supplemental agreement ('JVA/SA')
— JVA/SA entered into between plaintiff and first defendant in relation to
development of land — Plaintiff terminated JVA/SA with first defendant
— Whether there was repudiation of JVA/SA on part of defendants — Whether
second defendant induced or procured first defendant to break JVA/SA — Whether
there was justification in repudiation of contract on grounds of frustration
— Whether plaintiff entitled to damages*

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The plaintiff was a developer. The first defendant ('D1') was an incorporated company limited by shares wholly owned by the second defendant ('D2'). The plaintiff and D1 had entered into a joint venture agreement ('the JVA') which was varied and supplemented under a supplemental agreement ('the SA') ('the JVA/SA'). Pursuant to the JVA/SA, D1 appointed the plaintiff as the sole and exclusive developer on a turnkey joint-venture basis to develop a mixed development ('the project'). The project was to be constructed on approximately 352 acres of state land be alienated to D1 ('the land'). The respective undertakings and obligations of both the plaintiff and D1 were as stated in the JVA/SA. D1 had written to the plaintiff to inform that because of the economic downturn in the country, the state government had decided that the project would be deferred for at least three to five years depending on the recovery of the country's economy. D1 also stated that the state government would have had no objection if the plaintiff wanted to carry out survey and conduct studies on the environment aspect as well as marketing the project. As for the environmental impact assessment of the project, after the plaintiff had done much work and spent considerable time and expense following meetings, studies, and reviews spearheaded by the plaintiff and its consultants, the Detailed Environmental Impact Assessment Final Report ('DEIA Final Report') was approved with conditions by the Federal Department of Environment. However, the approved DEIA Final report was rejected by the Director of State Environment Protection Department ('SEPD') ie DW2. The plaintiff challenged the decision under judicial review to quash the decision by an order of certiorari. The High Court dismissed the plaintiff's application with costs. The plaintiff appealed and the Court of Appeal allowed the plaintiff's appeal, set aside the High Court order, and directed the Director of SEPD to hear the plaintiff before he could decide whether to approve or to reject the DEIA Final Report. The plaintiff then issued a notice of termination

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A (‘NOT’) to D1. D1 responded stating that, among others, because of the economic downturn, the judicial review proceedings, and the enforcement of the law barring seafront development in Kota Kinabalu, the land was affected. D1 then offered to mutually terminate the JVA/SA. Hence this suit against D1 and/or against D2 as the principal behind D1 for breach of contract and/or
B repudiation and further or in the alternative the tort of inducing or procuring the breach of contract against D2 for having directly or indirectly induced or procured D1 to break the JVA/SA. The issues for consideration were: (a) whether there was a repudiation of the JVA/SA on the part of the defendants as alleged by the plaintiff; (b) whether D2 had induced or procured D1 to break
C the JVA/SA; (c) whether there was a justification in repudiation of the contract on grounds of frustration alleged by the defendants; and (d) whether the plaintiff was entitled to damages.

D **Held:**

- (1) The defendants had not given any plausible reasons why they did not process the issuance of the land title to the land. D1 had not only breached the JVA/SA but by its conducts also amounted to an absolute refusal to perform which would lead a reasonable person to say that D1
E had breached its promise in its entirety. The plaintiff therefore on balance of probabilities was entitled to terminate the JVA/SA. The defendants had remained silent on the issue of no bank/corporate guarantee furnished by the plaintiff to D1 when the power of attorney (‘PA’) was given to the plaintiff. It was now too late for the defendants to raise the
F plaintiff’s breach for not furnishing the bank/corporate guarantee. It was unreasonable for D1 to rely on the PA to escape from its undertaking to get the land title to the land. D1 could not say it no longer had the obligation to obtain the land title to land just because it had already given the PA to the plaintiff. In addition, the plaintiff had fulfilled its obligation
G on having obtained the approved DEIA Final Report as required under cl 3(c) of the JVA/SA (see paras 30–31, 37–38 & 41).
- (2) D1 understood the contents and the true purport of the NOT that was why it had asked for mutual termination of the JVA/SA. Issuing the
H NOT was procedural in nature and if the defendants felt so strongly on the alleged non-compliance of cl 8 of the JVA/SA for whatsoever reasons, the defendants could, if it so wished, filed an application to strike out the plaintiff’s suit. To raise this issue of cl 8 of the JVA/SA now, was too late in the day. The evidence showed that the plaintiff remained very
I interested in ready to proceed with the project. The defendants’ assertion that the plaintiff had lost its interest in the project was without basis. It was vice versa (see paras 52, 56 & 60).
- (3) D1 was not prepared or unable to comply with their part of the obligations as stipulated by the JVA/SA. D2’s conduct in instructing the

- D1 to reject the DEIA Final Report was not done in good faith. The so-called purported exercise of discretion to reject the already approved DEIA Final Report was no exercise of discretion. It was made in bad faith. The rejection amounted to a repudiation of the JVA/SA entitling the plaintiff to terminate the same. D1 and D2 were both responsible, by their conducts showed that they had conducted in repudiation of D1's contract obligations under the JVA/SA as they evinced a clear intention that they were unwilling, unable and not ready to perform the entire contract obligations (see paras 69 & 71–72). A B
- (4) D2 had knowledge of the JVA/SA, entered into, between D1 and the plaintiff. Because of D1's position, it being a D2's company and D2 being the state government who had control of state land, D1 surely was able to have the land title issued within a reasonable time. D2 had used DW2 to abuse his power to reject the already approved DEIA Final Report. D2 had indirectly interfered through the unlawful means of the Director of SEPD's unlawful decision in rejecting the already approved DEIA Final Report. D1 being wholly owned company of D2 was prohibited by D2 from performance of its contractual obligations. Having lost of the benefit of the JVA/SA, the plaintiff was expected to claim substantial damages and it was all due to the interference of D2. In addition, the defence of justification was not available to the defendants. The tort of procurement or inducement to breach the contract was complete and all the elements satisfied when DW2 issued his letter to unlawfully reject the DEIA Final Report (see paras 82, 87, 89–91 & 96–97). C D E
- (5) The Chief Minister of Sabah's ('CM') evidence on the meeting with DW2 on the restricted letter would have shed light on whether the CM had instructed DW2 to reject the approved DEIA Final Report because DW2's evidence was that D2 had changed its mind on proceeding with the project. Since the defendants did not call the CM and he was around at that time, the court was entitled to invoke s 114(g) of the Evidence Act 1950 and found that the CM had instructed DW2 to reject then approved DEIA Final Report. There could be no justification for DW2 to reject the approved DEIA Final Report. The rejection of the DEIA Final Report as contended by the defendants was one that they could have prevented but did not and therefore was fully at fault on its occurrence. The so-called frustration due to the rejection of the approved DEIA Final report was no frustration but a self-induced frustration. DW2 as the Director of SEPD had not properly exercise his discretion. On balance of probabilities there was no justification in repudiation of the contract on grounds of frustration, namely the SEPD's rejection of the DEIA Final Report. The alleged frustration was self-induced. The true intent and purport of s 9A of the Sabah Land Ordinance was to ensure that the project could not proceed so that the defendants could avail themselves to the defence of frustration to avoid liability. The defendants' conduct in F G H I

- A not paying the balance of the land premium showed that the defendants were delaying the implementation of the project because without the land title to the land the plaintiff could not start the project. On a balance of probabilities, the defendants had not proven frustration; but the plaintiff had proven on balance of probabilities that the rejection of the approved DEIA Final Report and s 9A of the Sabah Land Ordinance were self-induced (see paras 117, 121, 125 & 130–131).
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- (6) The plaintiff could not have expected PW5 was not a registered quantity surveyor after all he was with Jurukur Bahan LM. The defendants had not been prejudiced as they were allowed to defer cross examining PW5 until PW6's expert report was served on defendants' own expert ie DW1 and DW1 had the opportunity to study PW6's expert report and he had prepared a supplementary expert report to comment on the same. The plaintiff had proven its claim for damages under Part A and damages of RM387,752,493 was allowed. For damages under Part B, having read the audited financial statement and the plaintiff's own ledgers and accounting records which showed a further breakdown of figures and having read the parties' respective submissions, the plaintiff had on a balance of probabilities proven its claim for RM6,355,371 against the defendants. For damages under Part C, the plaintiff had on the balance of probabilities failed to prove its claim against the defendants. The report was highly remote and uncertain and hence this part of the plaintiff's claim was disallowed (see paras 143, 152, 161 & 169).
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- F **[Bahasa Malaysia summary]**
Plaintif adalah pemaju. Defendan pertama ('D1') adalah syarikat diperbadankan terhad menurut saham yang dimiliki sepenuhnya oleh defendan kedua ('D2'). Plaintif dan D1 telah menandatangani perjanjian usaha sama ('JVA') yang diubah dan ditambah berdasarkan perjanjian tambahan ('SA') ('JVA/SA'). Berdasarkan JVA/SA, D1 melantik plaintif sebagai pemaju tunggal dan eksklusif berdasarkan usaha sama turnkey untuk membangunkan pembangunan campuran ('projek'). Projek ini akan dibina di sekitar tanah negeri seluas 352 ekar yang diberi hak kepada D1 ('tanah'). Tanggungjawab dan kewajiban masing-masing plaintif dan D1 adalah sebagaimana dinyatakan dalam JVA/SA. D1 telah menulis surat kepada plaintif untuk memberitahu bahawa kerana kemerosotan ekonomi negara, kerajaan negeri telah memutuskan bahawa projek itu akan ditangguhkan sekurang-kurangnya tiga hingga lima tahun bergantung pada pemulihan ekonomi negara. D1 juga menyatakan bahawa kerajaan negeri tidak akan menghalang jika plaintif ingin melakukan tinjauan dan melakukan kajian mengenai aspek lingkungan serta memasarkan projek tersebut. Bagi penilaian impak terhadap alam sekitar projek tersebut, setelah plaintif telah melakukan banyak pekerjaan dan menghabiskan banyak masa dan perbelanjaan berikutan mesyuarat, kajian, dan tinjauan yang diterajui oleh plaintif dan perundingnya,
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Laporan Akhir Penilaian Impak Alam Sekitar Terperinci ('Laporan Akhir DEIA') diluluskan dengan syarat oleh Jabatan Alam Sekitar Persekutuan. Walau bagaimanapun, Laporan Akhir DEIA yang diluluskan ditolak oleh Pengarah Jabatan Perlindungan Alam Sekitar Negeri ('SEPD') iaitu DW2. Plaintiff mencabar keputusan di bawah semakan kehakiman untuk membatalkan keputusan itu dengan perintah certiorari. Mahkamah Tinggi menolak permohonan plaintiff dengan kos. Plaintiff mengemukakan rayuan dan Mahkamah Rayuan membenarkan rayuan plaintiff, mengetepikan perintah Mahkamah Tinggi, dan mengarahkan Pengarah SEPD untuk mendengar plaintiff sebelum beliau dapat memutuskan sama ada untuk membenarkan atau menolak Laporan Akhir DEIA. Plaintiff kemudian mengeluarkan notis penamatan ('NOT') kepada D1. D1 menjawab dengan menyatakan bahawa, antara lain, kerana kemerosotan ekonomi, proses semakan kehakiman, dan penguatkuasaan undang-undang yang melarang pembangunan pinggir laut di Kota Kinabalu, tanah tersebut terjejas. D1 kemudian menawarkan untuk bersama menamatkan JVA/SA. Oleh itu, tuntutan ini terhadap D1 dan/atau terhadap D2 sebagai prinsipal dibelakang D1 kerana melanggar kontrak dan/atau penolakan dan selanjutnya atau sebagai alternatif tort mendorong atau membangkitkan pelanggaran kontrak terhadap D2 kerana secara langsung atau tidak langsung telah mendorong atau membangkitkan D1 untuk melanggar JVA/SA. Isu-isu untuk pertimbangan adalah: (a) sama ada terdapat penolakan JVA/SA di pihak defendan seperti yang didakwa oleh plaintiff; (b) sama ada D2 telah mendorong atau membangkitkan D1 untuk melanggar JVA/SA; (c) sama ada terdapat justifikasi dalam penolakan kontrak dengan alasan kekecewaan yang didakwa oleh defendan; dan (d) sama ada plaintiff berhak mendapat ganti rugi.

Diputuskan:

- (1) Defendan tidak memberikan alasan yang masuk akal mengapa mereka tidak memproses pengeluaran hakmilik tanah kepada tanah tersebut. D1 tidak hanya melanggar JVA/SA tetapi dengan kelakuannya juga merupakan penolakan mutlak untuk melakukan yang akan menyebabkan seseorang yang masuk akal mengatakan bahawa D1 telah melanggar janjinya secara keseluruhan. Oleh itu, plaintiff berdasarkan imbalan kebarangkalian berhak untuk menamatkan JVA/SA. Defendan kekal berdiam diri atas isu tidak ada jaminan bank/korporat yang diberikan oleh plaintiff kepada D1 ketika surat kuasa wakil ('PA') diberikan kepada plaintiff. Sekarang sudah terlambat bagi defendan untuk membangkitkan pelanggaran plaintiff kerana tidak memberikan jaminan bank/korporat. Tidak masuk akal bagi D1 untuk bergantung pada PA untuk melepaskan diri dari tanggungjawabnya untuk mendapatkan hakmilik tanah tersebut. D1 tidak dapat mengatakan bahawa ia tidak lagi memiliki kewajiban untuk mendapatkan hakmilik tanah hanya kerana telah memberikan PA kepada plaintiff. Di samping

- A itu, plaintif telah memenuhi kewajibannya setelah memperoleh Laporan Akhir DEIA yang diluluskan sebagaimana yang diperlukan di bawah klausa 3(c) JVA/SA (lihat perenggan 30–31, 37–38 & 41).
- (2) D1 memahami isi kandungan dan maksud sebenar NOT itu kerana ia meminta untuk bersama menamatkan JVA/SA. Mengeluarkan NOT bersifat prosedural dan jika defendan merasakan dakwaan ketidakpatuhan klausa 8 JVA/SA dengan alasan apa pun, defendan boleh, jika mahu, memfailkan permohonan untuk membatalkan tuntutan plaintif. Untuk membangkitkan isu klausa 8 JVA/SA ini sekarang, sudah terlambat. Keterangan menunjukkan bahawa plaintif tetap sangat berminat untuk bersedia meneruskan projek tersebut. Penegasan defendan bahawa plaintif telah kehilangan minatnya terhadap projek itu tidak berasas. Ia adalah sebaliknya (lihat perenggan 52, 56 & 60).
- D (3) D1 tidak bersedia atau tidak dapat memenuhi bahagian daripada kewajiban mereka sebagaimana yang ditetapkan oleh JVA/SA. Tingkah laku D2 dalam mengarahkan D1 untuk menolak Laporan Akhir DEIA tidak dilakukan dengan niat baik. Apa yang disebut sebagai tindakan budi bicara untuk menolak Laporan Akhir DEIA yang telah diluluskan bukanlah tindakan budi bicara. Ia dibuat dengan niat buruk. Penolakan itu sama dengan penolakan JVA/SA yang memberi hak kepada plaintif untuk menamatkannya. D1 dan D2 sama-sama bertanggungjawab, dengan tingkah laku mereka menunjukkan bahawa mereka telah melakukan penolakan terhadap kewajiban kontrak D1 di bawah JVA/SA kerana mereka menunjukkan niat yang jelas bahawa mereka tidak mahu, tidak dapat dan tidak bersedia untuk melaksanakan keseluruhan tanggungjawab kontrak (lihat perenggan 69 & 71–72).
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- G (4) D2 memiliki pengetahuan tentang JVA/SA, yang dimasuki, antara D1 dan plaintif. Oleh kerana kedudukan D1, sebagai syarikat D2 dan D2 menjadi pemerintah negeri yang menguasai tanah negeri, D1 pasti dapat memiliki hakmilik tanah tersebut dikeluarkan dalam waktu yang wajar. D2 telah menggunakan DW2 untuk menyalahgunakan kuasanya untuk menolak Laporan Akhir DEIA yang telah diluluskan. D2 secara tidak langsung telah campur tangan melalui cara yang tidak sah berkenaan keputusan tidak sah Pengarah SEPD dalam menolak Laporan Akhir DEIA yang telah diluluskan. D1 sebagai syarikat milik penuh D2 dilarang oleh D2 untuk melaksanakan tanggungjawab kontraknya. Setelah kehilangan kepentingan JVA/SA, plaintif dijangka untuk menuntut ganti rugi yang besar dan semuanya disebabkan oleh campur tangan D2. Di samping itu, pembelaan justifikasi tidak tersedia untuk defendan. Tort perolehan atau dorongan untuk melanggar kontrak telah lengkap dan semua elemen dipenuhi ketika DW2 mengeluarkan suratnya untuk menolak Laporan Akhir DEIA secara tidak sah (lihat
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perenggan 82, 87, 89–91 & 96–97).

- (5) Keterangan Ketua Menteri Sabah ('CM') mengenai mesyuarat dengan DW2 berkenaan surat larangan tersebut akan menjelaskan sama ada CM telah mengarahkan DW2 untuk menolak Laporan Akhir DEIA yang diluluskan kerana keterangan DW2 adalah bahawa D2 telah mengubah fikiran untuk meneruskan projek. Oleh kerana defendan tidak memanggil CM dan beliau ada pada waktu itu, mahkamah berhak untuk membangkitkan s 114(g) Akta Keterangan 1950 dan mendapati bahawa CM telah mengarahkan DW2 untuk menolak Laporan Akhir DEIA yang diluluskan. Tidak mungkin terdapat justifikasi untuk DW2 menolak Laporan Akhir DEIA yang diluluskan. Penolakan Laporan Akhir DEIA sebagaimana yang dibahas oleh defendan adalah sesuatu yang dapat mereka cegah tetapi tidak dan oleh itu sepenuhnya bersalah atas kejadian itu. Kekecewaan yang disebabkan oleh penolakan laporan Akhir DEIA yang diluluskan bukanlah kekecewaan tetapi kekecewaan yang disebabkan oleh diri sendiri. DW2 sebagai Pengarah SEPD tidak menggunakan budi bicaranya dengan betul. Atas imbalan kebarangkalian tiada justifikasi untuk menolak kontrak dengan alasan kekecewaan, iaitu penolakan SEPD terhadap Laporan Akhir DEIA. Dakwaan kekecewaan itu disebabkan oleh diri sendiri. Niat dan tujuan sebenar s 9A Ordinan Tanah Sabah adalah untuk memastikan bahawa projek itu tidak dapat diteruskan supaya defendan dapat memanfaatkan pembelaan kekecewaan untuk mengelakkan liabiliti. Tingkah laku defendan dalam tidak membayar baki premium tanah menunjukkan bahawa defendan menangguhkan pelaksanaan projek kerana tanpa hakmilik tanah plaintif tidak dapat memulakan projek. Berdasarkan imbalan kebarangkalian, defendan tidak membuktikan kekecewaan; tetapi plaintif telah membuktikan ayas imbalan kebarangkalian bahawa penolakan Laporan Akhir DEIA yang diluluskan dan s 9A Ordinan Tanah Sabah adalah disebabkan oleh diri sendiri (lihat perenggan 117, 121, 125, & 130–131).
- (6) Plaintif tidak boleh menjangkakan PW5 bukan juruukur bahan berdaftar setelah dia bersama Jurukur Bahan LM. Defendan tidak diprejudis kerana mereka dibenarkan untuk menangguhkan pemeriksaan balas PW5 sehingga laporan pakar PW6 disampaikan kepada pakar defendan sendiri iaitu DW1 dan DW1 berpeluang untuk mengkaji laporan pakar PW6 dan dia telah menyiapkan laporan pakar tambahan untuk memberi komen mengenainya. Plaintif telah membuktikan tuntutan untuk ganti rugi di bawah Bahagian A dan ganti rugi sebanyak RM387,752,493 dibenarkan. Bagi ganti rugi di bawah Bahagian B, setelah membaca penyata kewangan yang diaudit dan lejar dan rekod perakaunan plaintif sendiri yang menunjukkan perincian angka lebih lanjut dan setelah membaca penghujahan pihak masing-masing, plaintif telah membuktikan atas imbalan

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- A kebarangkalian tuntutananya sebanyak RM6,355,371 terhadap defendan. Untuk ganti rugi di bawah Bahagian C, plaintif atas imbalan kebarangkalian gagal membuktikan tuntutananya terhadap defendan. Laporan itu sangat terpendil dan tidak dapat dipastikan dan oleh itu bahagian tuntutan plaintif ini tidak dibenarkan (lihat perenggan 143, 152, 161 & 169).]
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Cases referred to

- Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)
- C *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] 5 MLJ 697, FC (refd)
- Ban Hong Joo Mines Ltd v Chen & Yap Ltd* [1969] 2 MLJ 83, FC (refd)
- Choo Yin Loo v SK Visuvalingam Pilly* [1930] 7 FMSLR 135 (refd)
- Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464, FC (refd)
- D *Greig v Insole; World Series Cricket Pty Ltd v Insole* [1978] 1 WLR 302, Ch D (refd)
- Hwa Chea Lin & Anor v Malim Jaya (Melaka) Sdn Bhd* [1996] 4 MLJ 544, HC (refd)
- E *Jaafar Bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509, SC (refd)
- Joseph Constantine Steamship Line, Limited v Imperial Smelting Corporation, Limited* [1942] AC 154, HL (refd)
- F *Khoo Teng Chye v Cekal Berjasa Sdn Bhd & Anor* [2015] MLJU 992; [2015] 6 CLJ 449, CA (refd)
- Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105, FC (refd)
- Mars Equity Sdn Bhd v Tis 'Ata' Ashar Sdn Bhd* [2006] 4 MLJ 302; [2005] 1 CLJ 513, CA (refd)
- G *Mersey Steel and Iron Co v Naylor, Benzon & Co* (1884) 9 App Cas 434, HL (refd)
- Mohd Nazari bin Ab Majit v Tan Keo Hock & Anor* [1998] MLJU 382; [1999] 1 CLJ 601, HC (refd)
- H *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38; [2004] 3 CLJ 96, CA (refd)
- Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474, SC (refd)
- Ng Kheng Yong @ Ng Tet Lai v Seng Hup Realty Co Sdn Bhd* [2004] 3 MLJ 477, CA (refd)
- I *Oon Hock Lai & Anor v Lee Kok Leong* [1990] 1 CLJ 951, HC (refd)
- Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293, FC (refd)
- Polygram Records Sdn Bhd c The Search & Anor* [1994] 3 MLJ 127, HC (refd)
- Prai Power Sdn Bhd v Malayawata Steel Berhad* [2013] 1 LNS 1530, CA (refd)

- RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665; [2010] 2 MLJ 188, FC (refd) **A**
- Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291, SC (refd)
- Sime Hok Sdn Bhd v Soh Poh Sheng* [2013] 2 MLJ 149, FC (refd)
- Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1, FC (refd) **B**
- Superlatex Sdn Bhd v Multi-Purpose Commodity Trading Sdn Bhd* [2007] 3 AMR 572, CA (refd)
- Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)
- The State Government of Sabah & Ors v Clarence Chihuh Ken Loong & Ors* [2017] 3 MLJ 127, CA (refd) **C**
- Timur Permai Holdings Sdn Bhd v Soon Seng Plywood & Timber Sdn Bhd (No 2)* [1998] 3 CLJ 408, HC (refd)
- Transwater Tenaga Sdn Bhd v Aps Technologies Sdn Bhd & Anor* [2007] 1 MLJ 301; [2007] 1 CLJ 159, CA (refd)
- Tun Datu Haji Mustapha bin Datu Harun v Legislative Assembly of State of Sabah & Ors* [1986] 2 MLJ 388 (refd) **D**
- Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors* [2000] 3 MLJ 699, CA (refd)
- Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152, SC (refd) **E**

Legislation referred to

- Chief Minister (Incorporation) Ordinance Cap 23
- Civil Law Act 1956 ss 11, 15, 16
- Contracts Act 1950 ss 10(1), 40, 47, 55, 57, 57(2), 66, 74(1) **F**
- Evidence Act 1950 ss 101, 102, 114(g)
- Land Ordinance (Cap 68) ss 9A, 88
- Quantity Surveyors Act 1967
- Rules of Court 2012 O 34 r 2(2), O 40 r 1(1)
- David Fung Yin Kee (Grace Chieng Beng En with him) (Alex Pang & Co) for the plaintiff.* **G**
- Nor Asiah Mohd Yusof (Dayangku Fazidah Hatun bt Pg Bagul, Roderic Fernandez, Chung Kai Lun and Wong Chik Kien with her) (Sabah State Attorney General Chambers) for the defendants.* **H**

Mairin Idang J:

INTRODUCTION

- [1] The plaintiff is a developer. The first defendant ('D1') is an incorporated company limited by shares wholly owned by the second defendant ('D2') through the Chief Minister (Incorporation) Ordinance Cap 23. The plaintiff and D1 had entered into a joint venture agreement ('JVA') dated 7 April 1997 which was varied and supplemented under a supplemental **I**

- A** agreement ('SA') dated 23 June 1997 (the JVA and SA are referred to as 'JVA/SA'). Pursuant to the JVA/SA, D1 appointed the plaintiff as the sole and exclusive developer on a turnkey joint-venture basis to develop a mixed development which included a City Hall, Convention Centre, promenade, landscaping and other related infrastructure more particularly identified in
- B** Appendix 2 of the SA ('the project'). The project was to be constructed on approximately 352 acres of State Land located within the Likas Bay area which was to be alienated to D1 as identified in Appendix 1 of the SA ('the said land'). The respective undertakings and obligations of both the plaintiff and D1 were as stated in the JVA/SA. The plaintiff terminated the JVA/SA on 10 August
- C** 2015. Hence this suit against D1 and/or against D2 as the principal behind D1 for breach of contract and/or repudiation and further or in the alternative the tort of inducing or procuring the breach of contract against D2 for having directly or indirectly induced or procured D1 to break the JVA/SA. D1 and D2
- D** are also referred to as the defendants.

[2] In this suit the plaintiff is claiming against the defendants:

- (a) damages in the sum of RM1,153,155,371, or as assessed;
- E** (b) further damages in the sum of RM4,693,633, or as assessed;
- (c) discretionary interest under s 11 of the Civil Law Act 1956 upon the damages as assessed at the rate of 5%pa from 10 October 2015 until the date of judgment or at such rate and for such period as the court deems just;
- F** (d) judgment interest upon the judgment sum at the rate of 5%pa from the date of judgment until the date of full payment;
- (e) such further or other relief and remedy the court thinks fit and just; and
- G** (f) costs.

[3] At the start of the trial the following documents were marked:

- (a) bundle of pleadings which carries the amendment that have been put in — encl 49 — marked as BP.
- H** (b) statement of agreed facts — encl 52 — marked as SAF (except paras 26 and 29);
- (c) agreed and admitted bundle of documents — encl 50 — marked as AAB (authenticity and contents are agreed and admitted);
- I** (d) agreed bundle of documents — Vol 1 — marked as AB1;
- (e) agreed bundle of documents — Vol 2 — marked as AB2;
- (f) agreed bundle of documents — Vol 3 — marked as AB3;

- (g) agreed bundle of documents — Vol 4 — marked as AB4; A
- (h) agreed bundle of documents — Vol 5 — marked as AB5; and
- (i) agreed bundle of documents — Vol 6 — marked as AB6.

[4] During the trial, the plaintiff had called six witnesses, namely Tan Teck Kong @ Mohammad Ibrahim ('PW1'), Chong Sui Chiang @ Adrian ('PW2'), Chau Nam Kong ('PW3'), Matnasir bin Tasin ('PW4'), Lee Li Chee ('PW5') and Francis Tan Kok Ping ('PW6'). The defendants had called five witnesses, namely Moh Mee Ying ('DW1'), Eric Usip bin Juin ('DW2'), Chan Kok Ming ('DW3'), Rayman bin Loudrize ('DW4') and Kuh Yuen Kiu @ Edward ('DW5'). There were two expert witnesses called to assist the court on the issue of damages (ie PW6 and DW1). B C

AGREED FACTS D

[5] The court is thankful to both parties for the agreed facts (see encl 52 marked as SAF) and the same are reproduced:

1. The first defendant is and was at all material times an incorporated company limited by shares, wholly-owned by the second defendant through the Chief Minister (Incorporation) Ordinance Cap. 23, and having its registered office at 11th Floor, Block A, Wisma Tun Fuad Stephens, Karamunsing, 88300 Kota Kinabalu, Sabah, Malaysia. E
2. By a Joint Venture Agreement in writing dated 7 April 1997 between the plaintiff and the first defendant ('the JVA') — which was subsequently varied and supplemented under a Supplemental Agreement in writing dated 23 June 1997 ('the SA') — the first defendant appointed the plaintiff as the sole and exclusive developer on a turnkey joint-venture basis to commence and complete a mixed development which is predominantly commercial and includes a City Hall, Convention Centre, promenade, landscaping and other related infrastructure as more particularly identified in Appendix 2 of the SA ('the Project') on approximately 352 acres of State Land to be alienated to the first defendant in the Likas Bay area as identified in Appendix 1 of the SA ('the said Land'). F G H
3. Recital 2 and 3, and Clauses 2(d), 4, 5(b), 7 and 8 of the JVA were subsequently agreed between the plaintiff and the first defendant to be varied and supplemented in the manner expressly shown in Clause 1 at sub-clauses 1.1 to 1.10 of the SA. The first defendant is described as the Vendor and the plaintiff as the Developer in the JVA and the SA, and the agreements will be referred to for their full terms and effects at the trial of this suit. I
4. Before entry into the JVA, the State Government of Sabah through the Ministry of Local Government and Housing has authorized and

- A** empowered the first defendant to enter into the JVA by a letter dated 3 April 1997 and this was represented in Recital 5 of the JVA.
- B** 5. The first defendant has also represented to the plaintiff at Recital 2 of the JVA that it had applied under Land Application No 96010390 to the State Government of Sabah for approximately 1,200 acres more or less in the District of Kota Kinabalu.
- C** 6. Later Clause 1.2 of the SA stated that the parties agree to submit separate fresh land applications, one set for the aggregate area of 150 acres demarcated for the plaintiff and the other set for the aggregate 202 acres demarcated for the first defendant, but this did not eventuate and in the event it was pursuant to Land Application No 96010390 that the said Land was offered to be alienated by the state government to the first defendant.
- D** 7. Under Clause 2(a) of the JVA the first defendant is to facilitate or assist in the issuance of the Letter of Offer to alienate the said Land from the relevant authorities within a reasonable period of signing of the JVA for the purpose of carrying out the Project.
- E** 8. Under Clause 3(d) of the JVA the plaintiff shall upon execution of the JVA pay the first defendant the sum of RM1,000,000.00 interest-free deposit to secure the plaintiff's performance, and which sum the plaintiff has accordingly paid to the first defendant.
- F** 9. Under Clause 3 of the JVA and as supplemented by the SA, the plaintiff shall on a turnkey basis at its own expense and resources design, submit the necessary plans for approval from the relevant authorities, construct and manage the Project to deliver practical completion of the Project within seventy-two (72) months from the date of receipt of all approvals for all required plans for construction and completion of the Project including that of the Environmental Impact Authority.
- G** 10. It was provided under Clause 3(f) and 3(g) of the JVA (as supplemented by the SA) that the works to be undertaken by the plaintiff under the Project are as set out in Appendix 2 of the SA in the estimated Total Development Costs of RM414,587,880.00, which items of work are broadly itemized. Item 10 in Appendix 2 therein, described as City Hall/Convention Centre & associated infrastructure, is to cost RM140,000,000.00.
- H**
- I** 11. Under Clause 4(a) of the JVA (as varied by the SA), the plaintiff 'shall at its own costs construct, complete and deliver to [the first defendant] free from encumbrances and with vacant possession the Vendor's Entitlement which shall consist, inter alia, of the City Hall, the Convention Centre, promenade, landscaping and other associated infrastructure'.
12. Clause 4(b)(i) of the JVA (as varied by the SA) then in return provides that, 'For the consideration aforesaid the [first defendant] shall procure and/or assist to procure the issuance of separate title deeds for the said 150 acres in favour of the [plaintiff], which are freely transferable, free from

- encumbrances and duly endorsed thereon with a land use/zoning that is unconditionally commercial and with vacant possession'. A
13. Clause 4(b)(ii) of the JVA (as varied by the SA) states that if the premium imposed for the issuance of title deed to the 150 acres exceeds the nominal sum of RM1,000.00 then the first defendant will be responsible and may apply for its waiver, provided that if the premium payable exceeds the Total Development Costs (as defined herein), the excess amount shall be paid by the plaintiff either in cash or in kind by the plaintiff relinquishing a portion of its entitlement to the developed commercial project or other properties as mutually agreed to the State Government of Sabah, and provided further that if the premium payable is less than the Total Development Costs the deficit amount shall be paid by the first defendant to the plaintiff either in cash or in kind in the form of alienation or transfer of commercial land to the plaintiff as mutually agreed between them. B C
14. Clause 5(a) & (b) of the JVA, as varied by the SA, provides for the grant of a power of attorney by the first defendant to the plaintiff in respect of the said Land to submit plans and to deal with the authorities. Under Clause 5(b) the power of attorney to be granted shall also empower the plaintiff to charge the said Land for financing the development of the Project *provided that* the plaintiff furnished a corporate or banker's guarantee in the amount of RM160,000,000.00 only '(which amount shall represent the value of the 48.00 acres (Lot D on Appendix 3) being the [first defendant's] land, the cost of construction to completion the City Hall, the Convention Centre and the associated infrastructure costs, fees and other expenses)' in favour of the first defendant and *provided further* that as and when the value of the works for the Project reach every 10% of the value of the corporate guarantee the principal guaranteed under it will be proportionately reduced and be replaced by a fresh corporate guarantee for the reduced sum. D E F
15. Clause 4(a), 4(b)(i) and (ii), 5(a) and 5(b) of the JVA, as varied by the SA, and read together with Clause 1.2 of the SA as well as the whole of the JVA and the SA show that in consideration of the plaintiff constructing at its own costs up to the estimated amount of RM160,000,000.00 and not exceeding the Total Development Costs and delivering the first defendant's entitlement free from encumbrances and with vacant possession, consisting in the main the City Hall, the Convention Centre, promenade, landscaping and other associated infrastructure, the first defendant shall procure or assist to procure the issuance of title deed/s to the 150 acres of freely transferable commercial land, free from encumbrances and with vacant possession, in favour of the plaintiff. G H
16. The Letter of Offer to alienate the said Land was issued by the Director of The Lands and Surveys Department ('the land department') to the first defendant on 27 May 1998. I
17. The first defendant accepted the Offer on 8 June 1998 by signing its acceptance on the Offer, and payment of the required fifty per centum

- A** (50%) of the nominal Premium of RM1,000.00 for the said Land was made by the plaintiff on the first defendant's behalf.
- B** 18. Following two meetings, on 14 and 30 September 1998, with the Director of the land department, the first was with other developers and the second only with the plaintiff and first defendant, the land department has agreed to delete and review some of the special conditions in the Offer.
- C** 19. It was also agreed at the 30 September 1998 Meeting that the land department would proceed to prepare the master title for the said Land and that, if, before issuance of the master title the first defendant made early payment of the full premium for the plaintiff's 150 acres of commercial land, the land department is willing to issue two (2) titles, one for 200 acres upon the payment of nominal premium but with full restriction under special conditions, and the other 150 acres to be free from encumbrances and which the first defendant has the power to transfer to the plaintiff.
- D** 20. At the 30 September 1998 meeting, the Director of the land department informed both the plaintiff and the first defendant that the full premium for the said Land without the restrictions imposed by the special conditions would be RM211,320,000.00, and the full premium without the restrictions for the plaintiff's 150 acres would be RM160,000,000.00.
- E** 21. Meanwhile, on 5 May 1998 the first defendant has written to the plaintiff to inform that because of the economic downturn in the country, the state government had decided that the Project would be deferred for at least three to five years depending on the recovery of the country's economy.
- F** 22. In the same letter of 5 May 1998 the first defendant also stated that the state government would have had no objection if the plaintiff wanted to carry out survey and conduct studies on the environment aspect as well as marketing the Project.
- G** 23. On 16 June 1997 the plaintiff had obtained the approval from the Central Town and Planning Board to allow re-zoning of the said Land to commercial land.
24. On 27 July 2001 the plaintiff obtained approval in principle of the Traffic Impact Study from the Dewan Bandaraya Kota Kinabalu.
- H** 25. As for the environmental impact assessment of the Project, after the plaintiff had done much work and spent considerable time and expense following meetings, studies, and reviews spearheaded by the plaintiff and its consultants, the Detailed Environmental Impact Assessment Final Report ('DEIA Final Report') was approved with conditions by the Department of Environment on 6 August 2001.
- I** 26. [deleted see page 3 NOP]
27. In the said restricted letter, after informing, amongst others, that the DEIA Final Report had been approved by the DOE it proceeded to recommend that although all the impacts on the environment had been

- assessed and the control measures in place, the second defendant can give due attention to the need for the project and the public's objections before the decision to approve the project is made. A
28. It now appears that the immediate backdrop to the DOE's approval was that although Sabah's Environmental Enactment and subsidiary legislation had by then empowered the Director of the Sabah State Department of Environmental Conservation to consider environmental issues, the said State Director, upon the then Chief Minister of Sabah's instruction, as advised by the State Attorney-General, was of the stance that the power still rested on the DOE since the environmental impact assessment was started and processed under the DOE, and thus the DOE was the rightful body to decide on the DEIA Final Report. The said State Director had accordingly informed the DOE of the same in his letter dated 13 July 2001 in reply to DOE's letters dated 13 February 2001 and 9 May 2001. B C
29. [deleted see page 3 NOP] D
30. The plaintiff challenged the decision under Judicial Review No K24-287 of 2002 in the Kota Kinabalu High Court to quash the State's environmental director's decision by an order of certiorari. Having obtained leave to proceed with judicial review and after full arguments in May 2008, the parties waited until decision was given on 19 April 2013 when the High Court dismissed the plaintiff's application with costs. E
31. Being dissatisfied with the High Court decision and also to protect the plaintiff's and the first defendant's rights and interests in the JVA, the plaintiff appealed to the Court of Appeal. F
32. On 10 November 2014, after hearing the parties the Court of Appeal allowed the plaintiff's appeal, set aside the High Court order dated 19 April 2013, and directed the State environmental director to hear the plaintiff before he could decide whether to approve or to reject the DEIA Final Report. G
33. On 10 August 2015 the plaintiff through its solicitors' letter of that date issued a Notice of Termination to the first defendant.
34. The first defendant responded to the Notice of Termination by way of letter dated 2 September 2015. In its letter the first defendant, among others, said that because of the economic downturn mentioned in its letter dated 5 May 1998, the judicial review proceedings, and the enforcement of the law barring seafront development in Kota Kinabalu, the said Land was affected. The first defendant then offered to mutually terminate the JVA and the SA. H I
35. [deleted]

A ISSUES FOR TRIAL

B [6] There were no agreed issues despite directions of the court during pre-trial case management (see O 34 r 2(2) of the Rules of Court 2012). Instead both counsels had proposed their respective issues in their respective oral opening speeches. The court, after reading the pleadings, the submissions and having considered the respective opening speeches have come to the following issues:

- C** (a) whether there was a repudiation of the JVA/SA on the part of the defendants as alleged by the plaintiff;
- (b) whether the second defendant had induced or procured the first defendant to break the JVA/SA;
- D** (c) whether there was a justification in repudiation of the JVA/SA on grounds of frustration as alleged by the defendants; and
- (d) the plaintiff is entitled to damages.

E [7] Let me start by revisiting some basic principle of laws on ‘burden of proof’, ‘pleadings’ and ‘agreement’ since they have been referred to by the parties.

BURDEN OF PROOF

F [8] It is well established as a general rule that ‘burden of proof’ in a civil case is on the plaintiff but the burden will shift when the plaintiff has adduced sufficient evidence of probative value which requires the defendant to rebut the plaintiff’s evidence (see *Khoo Teng Chye v Cekal Berjasa Sdn Bhd & Anor* [2015] MLJU 992; [2015] 6 CLJ 449). I am also in agreement with the submission of

G the defendants that the plaintiff has the burden of proving its case on the balance of probabilities ss 101 and 102 of the Evidence Act 1950 and *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1 referred to by the defendants say exactly that.

H PARTIES ARE BOUND BY THEIR PLEADINGS

I [9] In *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665; [2010] 2 MLJ 188, the Federal Court made it quite clear when it said, ‘It is cardinal rule in civil litigation that parties must abide by their pleadings ... On this, we would like to add that it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other’ (see also *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 (SC)).

PARTIES ARE BOUND BY THEIR AGREEMENT

A

[10] The general rule is this: 'You are bound by the terms of the agreement you signed, regardless of whether you have read or understood it or otherwise' (see *Polygram Records Sdn Bhd v The Search & Anor* [1994] 3 MLJ 127 and s 10(1) of the Contracts Act 1950).

B

[11] Now we start with issue (i).

Whether there was a repudiation of the JVA/SA on the part of the defendants as alleged by the plaintiff

C

The JVA/SA

[12] Let me first deal with the defendants' submission that the JVA/SA '... is in fact and in reality, not a joint venture' though labelled as a 'Joint Venture Agreement'. Such submission however is not part of the defendants' pleaded case, so the court needs not consider the same. It is trite law that parties are bound by their pleadings (see *RHB Bank Bhd*).

D

E

[13] Now back to the JVA/SA, the commercial bargain between the plaintiff and D1 is very clear. There is business synergy here; the plaintiff has all the experience and financially able to complete the project and deliver D1's entitlement. And D1 being a government wholly owned company is in the position to secure the said land with the issuance of the Land title and to assist in all other matters for the successful implementation of the project. Their respective rights and obligations were as stipulated in JVA/SA.

F

[14] The plaintiff submitted 'In consideration of the plaintiff constructing at its own costs up to the estimated amount of RM160m and not exceeding the total development costs and delivering the first defendant's entitlement free from encumbrances and with vacant possession, the first defendant shall procure or assist to procure the issuance of title deed/s to the demarcated 150 acres of freely transferable commercial land, free from encumbrances and with vacant possession, in favour of the plaintiff'. At the completion of the project the plaintiff would have delivered D1's entitlement which comprised of the City Hall, the Convention Centre, promenade, landscaping and other associated infrastructure. Whilst the plaintiff's entitlement would be the 150 acres together with land title which it intended to develop comprising of Lot A1, Lot A2, Lot A3, Lot A4, Lot A5, Lot B1, Lot B2, Lot C1, Lot C2, Lot C3, Lot C4 and Lot C5 as all shown, together with their individual acreage, in Appendix 3 of the SA, into a mixed commercial development of the following: four-storey, six-storey, seven-storey and eight-storey shops/offices; 16-storey

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H

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A hotel; 20-storey and 22-storey condominiums; corporate lots; complete with promenade, car parks, and public utilities (see paras 2, 3, 8, 9, 10, 11, 12, 15 SAF).

The law on repudiation

B [15] The plaintiff's case is that the first defendant, and/or the second defendant being the principal, had conducted in repudiation of the contract obligations under the JVA/SA as the defendants evinced a clear intention that they were unwilling, unable and not ready to perform the entire contract obligations upon which the plaintiff who remained ready and willing to perform the contract had issued a notice of termination (NOT) dated 10 August 2015 to accept the defendants' repudiation in accordance with the terms of the NOT.

D [16] In terminating the JVA/SA, the plaintiff had referred to s 40 of the Contracts Act 1950 (s 40). Let us read s 40 of the Contracts Act which provides as follows:

E When a party to a contract has refused to perform or disabled himself from performing his promise in its entirety, the promise may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuances.

F [17] It has been held by our court that s 40 is a re-statement of the English common law position (see *Choo Yin Loo v SK Visuvalingam Pilly* [1930] 7 FMSLR 135; *Oon Hock Lai & Anor v Lee Kok Leong* [1990] 1 CLJ 951; *Hwa Chea Lin & Anor v Malim Jaya (Melaka) Sdn Bhd* [1996] 4 MLJ 544; *Superlatex Sdn Bhd v Multi-Purpose Commodity Trading Sdn Bhd* [2007] 3 AMR 572 (CA); *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464; *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] 5 MLJ 697).

[18] Way back in 1919, Lord Atkin had this to say on repudiation:

H A repudiation has been defined in different terms-by Lord Selborne as an absolute refusal to perform a contract; by Lord Esher as a total refusal to perform it; by Bowen LJ in *Johnstone v Milling* 54 LT Rep 629; 16 QB Div 460 as a declaration of an intention not to carry out a contract when the time arrives, and by Lord Haldane in *Bradley v H Newson, Sons & Co Ltd* 119 LT Rep 239; [1919] AC 16 as an intention to treat the obligation as altogether at an end. They all come to the same thing, and they all amount at any rate to this, that it must be shown that the party to the contract made quite plain *his own intention* not to perform the contract (see *Spettabile Consorzio Veneziano Di Armamento E Navigazione v Northumberland Shipbuilding Co Ltd* (1919) 121 LT 628 at 634-635).

[19] In *Ban Hong Joo Mines Ltd v Chen & Yap Ltd* [1969] 2 MLJ 83 at [17],

the then Federal Court referred to *Mersey Steel and Iron Co v Naylor, Benzon & Co* (1884) 9 App Cas 434 at p 438 where the Lord Chancellor, Lord Selborne stated:

I am content to take the rule as stated by Lord Coleridge in *Freeth v Burr* (1874) LT 9 CP 208, which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part...

[20] On whether the contract has been repudiated, the then Supreme Court had explained that short of express refusal, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions' (see *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291 (SC)). The Federal Court stated that the main consideration to decide if a contract has been repudiated is whether there is a total failure of consideration, by virtue of the words in s 40 'his promise in its entirety' (see *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464 (FC)). Repudiation may be inferred through the combined effect of a party's action or inaction over a period of time (see *Sime Hok Sdn Bhd v Soh Poh Sheng* [2013] 2 MLJ 149 (FC)).

[21] Having referred to the above case law, the court will now discuss whether the plaintiff here was entitled to terminate the JVA/SA since it is the plaintiff's contention that D1 and/or D2 had conducted themselves in repudiation of their contract obligations under the JVA/SP. The court must consider the circumstances showing D1 and/or D2 had clear intention to abandon and altogether refuse to perform the contract. The plaintiff had submitted six factors supporting its termination of the JVA/SA. I will not discuss them in the order as submitted by the plaintiff but in my discussion on this issue, the six factors, where relevant would be addressed. I also take note that the plaintiff would only address and argue on the defence points raised in the defendants' opening speech.

[22] In denying liability to the plaintiff's claims for damages, the defendants sought to rely on two events, namely: (i) rejection of DEIA Final Report by the Director of SEPD; and (ii) the barring of alienation of land under s 9A of the Land Ordinance (s 9A) to say that they were excused from all liability because the doctrine of frustration of contracts would provide such an excuse. The defendants also denied that they are liable and say that the plaintiff had lost interest in the contract. They have listed four reasons namely: (i) plaintiff's

- A** focus of its 150 acres instead of the 352 acres in breach of the JVA/SA; (ii) prematurely demanding for the 150 acres prior to completion of first defendant's entitlement in breach of JVA/SA; (iii) plaintiff failed to furnish a bank/corporate guarantee in breach of cl 5 of JVA/SA though it had been granted a power of attorney; and (iv) the plaintiff's failure to issue two 90-day notices in breach of cl 8 of JVA/SA.
- B**

The six factors

- C** [23] What are those six factors which the plaintiff alleged supported its termination of the JVA/SA? The first factor dealt with the contract obligations under the JVA/SA which have been referred to in the statement of agreed facts (see paras 2–15 SAF). The second factor dealt with the delay of the project caused by the unlawful decision dated 21 October 2002 made by the Director of State Environment Protection Department (SEPD) in rejecting the DEIA
- D** Final Report which was earlier on approved on the 6 August 2001 by the Federal Department of Environment (FDOE), which led to the plaintiff filing for Judicial Review (JR) at the High Court until disposal of its appeal at the Court of Appeal (COA) (see paras 25, 27, 28, 31, 32 SAF). The third factor dealt with the plaintiff's letters of reminder to D1 during and after disposal of the JR by COA before termination of the JVA/SA. The fourth factor dealt with the plaintiff issuing the notice of termination (NOT) dated 10 August 2015 to D1 for it had shown that D1 was not ready or unwilling to proceed with the project and to perform its obligations (para 33 SAF). The fifth factor dealt with the defendants' inability and/or unwillingness to perform their entire contract obligations under the JVA/SA, since the entire or most fundamental part of the contract obligations promised by D1 was to procure issuance of the title deed to the said land (352 acres) under cl 2(b) that is suitable for the purpose of carrying the project. The sixth factor dealt with the plaintiff being ready and willing to perform the JVA/SA until its acceptance of the defendants' repudiation by the plaintiff's Notice of Termination dated 10 August 2015 according to the 90 days' period for D1 to rectify the breach. All these had been fully submitted by the plaintiff in its submission (see paras 36–142 plaintiff's submission encl 107).
- G**
- H** Parties' respective undertaking and obligations

- I** [24] It is important to know what exactly the obligations of the parties were. They are all there stated in the JVA/SA. Let me details some of them. For clarity, the plaintiff is referred to as the developer and D1 as the vendor in the JVA/SA:

2. Vendor's Undertaking

The Vendor hereby agrees and undertakes to observe, perform and execute the followings:

- (a) The vendor is to facilitate or assist in the issuance of the Letter of Offer to Alienate the said Land from the relevant authorities (hereinafter referred to as 'the said Letter of Offer') within a reasonable period of signing this Agreement for the purpose of carrying out the project. A
- (b) The Vendor is to procure the issuance of a title deed(s) in respect of the said Land free from registered encumbrances within a reasonable period from the date of issuance of the said Letter of Offer and the said Land is to be suitable for the purpose of carrying out the mixed commercial development approved by the Local Authorities or other relevant authorities. B
- (c) To enable the Developer to take early possession of the said Land as soon as practicable, the Vendor is to procure the approval from the relevant Land authorities the title survey of the said Land within a reasonable period from the date of this Agreement or alternatively to procure the issuance of a Temporary occupation Licence of the said Land. C
- (d) The Vendor shall be responsible to evict squatters if any from the said Land prior to the Developer taking possession thereof. In the event it becomes necessary to pay compensation to person or persons found in occupation of the said Land if any which are required to be removed before commencement of works under the Project, the Vendor shall be responsible for payment of such compensation provided that the Developer may at the request of the Vendor pay such compensation on behalf of the Vendor. D
- (e) During the validity of this Agreement, the Vendor shall faithfully and diligently observe and perform the terms contained herein and shall not negotiate or deal with any other party or parties in relation to the said Land and/or the Project or any part thereof except in dealings between the Vendor and the Vendor's own servants, consultants and advisers and with the Ministry of Local Government and Housing and other relevant authorities. E
- (f) During the validity of this Agreement, the Vendor shall faithfully and diligently observe and perform the terms contained herein and shall not negotiate or deal with any other party or parties in relation to the said Land and/or the Project or any part thereof except in dealings between the Vendor and the Vendor's own servants, consultants and advisers and with the Ministry of Local Government and Housing and other relevant authorities. F
- (g) During the validity of this Agreement, the Vendor shall faithfully and diligently observe and perform the terms contained herein and shall not negotiate or deal with any other party or parties in relation to the said Land and/or the Project or any part thereof except in dealings between the Vendor and the Vendor's own servants, consultants and advisers and with the Ministry of Local Government and Housing and other relevant authorities. G

3. Developer's Undertaking

The Developer hereby agrees and undertakes to observe perform and execute the following:

- (a) The Developer shall provide at its own expenses and from its own resources all expertise for the turnkey finance, design, construction, completion, management of the Project. H
- (b) The Developer shall expeditiously and promptly submit all plans and all amendments thereto to the Local Authorities or other relevant authorities for approval and for this purpose the Vendor is to render all assistance and information to the Developer to facilitate and expediate the issuance of such approval. Provided that the development plan and building plan shall be approved by the Vendor prior to its submission to the relevant authorities. I

- A** (c) The Developer shall deliver practical completion of the Project within Seventy-Two (72) months from the date of receipt by the Developer of all approvals of the development, layout, building, structural, engineering, infrastructural and all other plans for the Project (hereinafter called 'the Plans') granted by the relevant authorities and from the Environment Impact Authority for the reclamation, construction and completion of the Project.
- B**
- (d) The Developer shall on the execution of this Agreement pay to the Vendor a sum of RM1,000,000.00 interest free deposit to secure the due performance of the Developer.
- C** (e) The Developer shall diligently carry out the construction and complete the Project strictly in accordance with the approved Plans subject only to such modifications and the amendments as may be approved by the relevant authorities.
- D** (f) The works to be undertaken by the Developer under the Project are as set out in the Schedule hereto annexed marked 'APPENDIX 2' subject only to such modifications and amendments as are required by the relevant authorities.
- E** (g) The total Development Costs for the Project shall mean the total Contract Price plus professional fees, management fees, financing costs and such other costs as set out in the Schedule hereto annexed marked as 'APPENDIX 2' subject only to such modifications and amendments as are required by the relevant authorities.
- F** (h) It is further agreed that the total cost of contract works and other development costs for the Project shall be determined by the actual award(s) for the contract(s) through the normal acceptable tender process and the final account as certified by the professional architect/quantity surveyor and/or accountant shall be final and binding on the Parties hereto'.

G

Had the plaintiff performed

- H** [25] On signing of the JVA/SA the plaintiff had paid the no interest deposit of RM1m to the D1. The deposit was a huge sum of payment. The plaintiff was very much aware and very conscious of the provisions of the JVA/SA wherein it is required to complete and deliver D1's entitlement within 72 months from the date the plaintiff obtained approvals to all of the plans (cl 3(c) JVA) from the relevant authorities and the DEIA Final Report from the Department of Environment (FDOE) for the reclamation, construction and completion of the project. The plaintiff had to quickly engaged various professionals such as architects, engineers, surveyors, environmental scientists to conceptualise, plan, design and carry out further investigation on the project and also to obtain approvals, where required, of the development from the various government departments or authorities. This included meetings with the
- I**

professionals and the various government officers. All these works had taken up considerable time and expense on the part of the plaintiff. A

[26] The evidence showed many approvals were obtained by the plaintiff in compliance with its obligations under the JVA/SA; this was despite having received D1's letter dated 5 May 1998 informing the plaintiff that due to the economic downturn in the country, the state government (D2) had decided that the project would be deferred for at least three to five years depending on the recovery of the country's economy. However the same letter had also informed the plaintiff that D2 would have no objection if the plaintiff wanted to carry out survey and conduct studies on the environment aspect as well as marketing the project (see p 77 AB1). The plaintiff did exactly as was instructed by D1. B C

[27] Here are the evidence showing what the plaintiff had performed: D

- (a) preparation of the landscape development for the proposed new City Hall and commercial development (the presentation at pp 630–641 of AB4);
- (b) CMDP was submitted in June 1997 and approved on 3 August 1998 (p 642 of AB4); E
- (c) preparation of the concept and design of the proposed Kota Kinabalu City Hall and Convention Centre (at pp 643–697 of AB4);
- (d) re-zoning of the said land to commercial land was approved by the Central Town and Planning Board on 16 June 1997; F
- (e) survey for the said land carried out by land surveyor (p 698 of AB4 and dated 22 July 1997);
- (f) topographical and hydrographical survey of the project and we refer to this bearing Plan No JTSB-352-HT01 dated 30 July 1998 at p 777 of AB4; G
- (g) soil investigation for the design of seawall and reclamation works for the project in October 1997 and we refer to the report together with attached plan to show the borehole location at pp 699–775 and p 776 of AB4; H
- (h) CMDP was approved by the MPKK on 3 August 1998 and the Planning Approval granted by MPKK for the project is found at pp 117–123 of AB1; I
- (i) Licensed or Registered Title Survey of the said land which was dated 9 December 1998, at p 778 of AB4;

- A (j) the Detailed Environmental Impact Assessment Final Report ('DEIA Final Report') in September 1999 at p 922 and so forth comprising of the whole of AB6;
- B (k) the Traffic Impact Study was approved by the Dewan Bandaraya Kota Kinabalu on 27 July 2001 which Traffic Impact Study the plaintiff conducted in fulfilment of conditions contained in paras 2.5 and 2.6 of the Planning Approval; and
- C (l) the DEIA Final Report was approved by the Federal Department of Environment ('FDOE') on 6 August 2001 and the plaintiff partly pursued such approval in fulfilment of the condition contained in para 2.1 of the Planning Approval.

Had D1 performed

- D [28] D1's undertakings are listed in cl 2(a), (b), (c), (d), (e) and (f), of the JVA/SA. D1 had obligations to procure and/or assist to procure the issuance of the land title for the said land, or alternatively the respective land titles for 202 acres for D1 and the 150 acres in favour of the plaintiff (see cl 4(a), 4(b)(i) and
- E (ii), 5(a) and 5(b) of the JVA, as varied by the SA, read together with cl 1.2 of the SA). D1 is to assist and apply for the deletion of the special conditions prohibiting transfer, charge, sublease and subdivision of the said land, to apply for a waiver of the premium imposed for the issuance of title deed to the 150 acres or to apply to its Board to finance the payment of the premium (cl 4(b)(ii)
- F of the JVA (as varied by the SA). The evidence showed that D1 had on 14 and 30 September 1998 organised meetings with the Director of Lands & Surveys Department (LSD) to discuss all those matters. But sadly, despite those meetings none of those matters materialised. The plaintiff could also not enter the said land to start preliminary survey because D1 had not procured the
- G necessary approval from the relevant Land authorities, the title survey of the said land or alternatively to procure the issuance of a Temporary Occupation Licence of the said land. The evidence clearly showed the reciprocal promises between the plaintiff and D1 had not been fulfilled by D1. In the end and as the evidence showed, D1 had obtained only the issuance of the letter of offer to
- H alienate dated 27 May 1998 in respect of the said land (see paras 16–17 SAF) and D1 had granted the power of attorney (PA) to the plaintiff on the 29 May 1998 (para 14 SAF).

D1 failure to get the land title for the said land (325 acres)

- I [29] This is the main reason for the plaintiff to terminate the JVA/SA. The said land though already issued with the letter of offer and premium paid would only be secured with land title (see s 88 of the Land Ordinance). The land title must be issued that is the first step. The fact remains that the title deed

for the said land measuring in total 352 acres was never even issued to D1. It is D1's obligation to get the land title issued by LSD. The plaintiff submitted that the issuance of the land title to the said land is fundamental. It was also agreed that the land title is needed as security to raise funding to part finance the project. The plaintiff submitted that '... the defendants' inability and/or unwillingness to perform have been shown to be of their entire contract obligation under the JVA/SA, since the entire or most fundamental part of the contract obligation promised by D1 was to procure issuance of the title deed to the said land (352 acres) that is suitable for the purpose of carrying the project'. The plaintiff had referred to cl 2(b) of the JVA which laid this obligation upon D1 to procure the issuance of the title deed to the said land free from encumbrances within a reasonable period which was also highlighted in the NOT (pp 567–570 of AB3).

[30] Clause 2(b), *inter alia*, required that D1 must procure the issuance of the title deed to the said land free from encumbrances within a reasonable period from the date of the issuance of the letter of offer to Alienate dated 27 May 1998. But D1 had not done so and that too despite the plaintiff's written reminders. That was some seven years from the issuance of the letter of offer to alienate dated 27 May 1998 up to the issuance of NOT on 10 August 2015. Yet cl 2(b) speaks of 'reasonable period' for D1 to get the land title. What then is a reasonable period? I am of the view s 47 of the Contracts Act 1950 applies here on what amounts to reasonable period and this is a question of fact. The defendants have not given any plausible reasons why they did not process the issuance of the land title to the said land save to say the plaintiff should obtain the land title because it had given the PA. I will address this issue of the PA. At the outset, the evidence showed that the plaintiff could not make use of the PA and D1 was aware of this.

[31] But herein is my concern. There were no reasons given why D1, it being a government company, was unable to get D2 or LSD to issue the land title, after all land in Sabah is a State matter within the control of D2 and the CM is the minister in charge of land. The letter of offer to Alienate dated 27 May 1998 was already signed by D1 and 50% of the premium had been paid, D1 ought to have been able to process the issuance of the land title of the said land at least by 1991 which is three years from 1998. I am of the view found that since D1 is a government company, three years to process the land title is a reasonable period. With the title issued, the project would surely have proceeded and would have been completed with 72 months ie by 1997. But then the evidence showed after the last meeting with LSD on 14 and 30 September 1998 and despite several letters from the plaintiff, D1 had remained silent, passive, unwilling or unable or had disabled itself from performing its undertaking to get the land title to the said land. It was as if D1 was prepared to take a back seat having been instructed by D2 to inform the plaintiff of the

- A deferment of the project due to the economic downturn. I think D1 could or would not pursue the issuance of the land title to said land since D2 had informed the plaintiff to defer the project for three to five years due to the economic situation. In all circumstances and viewed objectively, I am of the view D1 had not only breached the JVA/SA but by its conducts also amounted
- B to an absolute refusal to perform which would lead a reasonable person to say that D1 had breached its promise in its entirety. It is therefore my view on this ground alone (not getting the land title to said land which is fundamental), the plaintiff on balance of probabilities is entitled to terminate the JVA/SA.
- C Power of attorney (PA)
- D [32] The defendants submitted that the plaintiff was fully responsible and empowered to obtain the title deed to the said land since the plaintiff had requested for the power of attorney (PA). The defendants had referred to cl 3 of the PA: 'Pending the issuance and registration of title deed(s) to the said Land and pursuant to Clause 5 of the said JV Agreement, the Donor wishes, by this Power of Attorney, to fully empower the Attorney to do all such things in respect of the said Land and the said Land Application, inter alia, to facilitate
- E the Attorney's development of the Project'. The defendants went on to explain the purpose of PA and had also referred to a book on *Powers of Attorney* by Nasser Hamid at pp 3–4 and also *Aldridge: Powers of Attorney* by Geoffrey A Shindler and Susan E Sherry (11th Ed).
- F [33] The plaintiff submitted that despite the PA, D1's duty would remain, including obtaining the land title of the said land in accordance with cl 2(b). The plaintiff submitted that the granting of the PA, in principle would never satisfy the performance of the duty that is owed by D1 to the plaintiff, for the power to do is not the duty to do which remains throughout on D1. The
- G plaintiff submitted D1 was supposed to follow up and resolve the issue of the title without the restrictions under the special terms of the letter of offer and related to that the payment or waiver of the premium following the meetings with the Director of LSD on 30 September 1998 and that this duty remains on
- H D1, which it failed to do so throughout up till the JVA/SA was terminated on 8 November 2015. The plaintiff therefore submitted that the PA cannot be used to facilitate the performance of the duty by D1 when it was supposed to perform that duty but did not perform. The plaintiff had specifically referred to the fact that the land title to the said land would have to be obtained first in
- I order for the plaintiff to raise financing for the project and only then the PA could be used by the plaintiff (see para 14 SAF).

[34] The plaintiff also submitted that D1 did not issue the direction to the plaintiff to resume work as such it was limited in what it can do even though the PA was available. The plaintiff had referred to the examination-in-chief (EIC) of Tan Teck Kong H Mohammad Ibrahim (PWI) (see lines 882–891 at p 33 NOP):

Q: Did the Plaintiff have to use the Power of Attorney found on pages 36 to 40 of AAB?

A: As I can remember, the Power of Attorney came very late. It came after the letter dated 5/5/1998 to stop work from the MLGH Sdn Bhd. The Power of Attorney was never used unless there is a resumption of work ordered or given by MLGH Sdn Bhd. I remember in the Agreement in order for us to get the Power of Attorney there should be a banker or corporate guarantee given back to MLGH Sdn Bhd. That was not carried out so the Power of Attorney cannot be used at all. We all understand that. (Emphasis added.)

The plaintiff to provide a banker or corporate guarantee

[35] It is the plaintiff's submission that it could not make use of the PA without first providing a banker or corporate guarantee to D1. The defendants also took issue on the plaintiff's failure to furnish the bank/corporate guarantee when D1 gave the PA to the plaintiff, asserting that this was in breach of cl 5(b) of the JVA/SA. The plaintiff submitted that the following features of cl 5(b) would assist its construction in relation to the JVA/SA, and that is first, the intended use of the PA is to charge the said land for financing of the development of the project, second, the use of this power to charge the said land is conditional on the plaintiff furnishing a corporate/banker's guarantee in the amount of RM160m to D1, third, it is expressly explained within cl 5(b) that the amount is determined by the value of the D1's entitlement, (City Hall, convention centre etc), fourth, that as the plaintiff's works on the project reaches every 10% of the corporate/banker's guarantee, the guarantee would be reduced proportionately with the issuance of a fresh corporate/banker's guarantee.

[36] The plaintiff also contended that its obligation to furnish the corporate/banker's guarantee is dependent on the ability to charge the said land to finance the project, and which in turn is dependent on D2 issuing the title deed for the said land or at least the separate title for the 150 acres to D1 without the restriction on charging it. The plaintiff submitted that since the defendants have not been able or unwilling to fulfil those prior obligations, they cannot then turn around to say that the plaintiff was not ready or willing to perform its promise to furnish the corporate/banker's guarantee. The plaintiff submitted this fact situation as proven on the evidence, brings it within s 55 of the Contracts Act 1950 and the ratio of *Mars Equity Sdn Bhd v Tis 'Ata' Ashar Sdn Bhd* [2006] 4 MLJ 302; [2005] 1 CLJ 513.

- A [37] There was of course no bank/corporate guarantee furnished by the plaintiff to D1 when the PA was given to the plaintiff. It raises the question, why in the first place D1 had to give the PA when the plaintiff did not provide the bank/corporate guarantee. Having given the PA, D1 did not also demand for the bank/corporate guarantee and D1 also did not see it fit to terminate the
- B JVA/SA on this alleged breach of cl 5(b). The evidence showed the defendants had remained silent on this issue of bank/corporate guarantee. I am of the view it is now too late for the defendants to raise the plaintiff's breach for not furnishing the bank/corporate guarantee. In all circumstances it is
- C unreasonable for D1 to rely on the PA to escape from its undertaking to get the land title to the said land. But then and as the evidence also showed, the plaintiff had not made use of the PA though it was available and ready for use (see PW1 evidence lines 882–891 at p 33 NOP). In cross-examination PW1
- D also said it was illegal for the plaintiff to use the PA without complying with the JVA/SA (lines 3077–3081 NOP). I find as fact from the circumstances that both the plaintiff and D1 understood that the PA cannot be used until the plaintiff had furnished the bank/corporate guarantee.

- E [38] I am also of the view that there was no need to use the PA just then. The evidence showed that the plaintiff was able to fulfil some of its obligations without resorting to the PA. I think that the PA would only be resorted to when the plaintiff was ready to get loan from the bank and that too when the land title to the said land has been issued and the plaintiff having furnished the bank/corporate guarantee (see 14 SAF). But it is also a fact that D1 continued
- F to fulfil its obligations despite having given the PA to the plaintiff. It was able to get the letter of offer issued and signing the same as well as arranging meetings with the Director of LSD pertaining to the application for removal of special conditions on prohibition to sublease, subdivision and charging of the said land. The plaintiff recognised and expected such assistance of D1, it being
- G a government company, it has got the ears of D2 as well as the government department such as the LSD. The facts showed that there was excellent synergy here between the plaintiff and D1 for mutual benefits. I am of the view that D1 being D2 wholly owned company is in fact in a better position to assist the plaintiff in getting the land title to said land. In any event D1 is also bound by
- H its obligation: '... the Vendor shall faithfully and diligently observe and perform the terms contained herein' towards realising the project (see cl 2(f) of the JVA/SA). In all circumstances, D1 cannot therefore say it no longer had the obligation to obtain the land title to said land just because it had already given the PA to the plaintiff.

- I Detailed Environmental Impact Assessment Final Report (DEIA Final Report)

[39] It is the plaintiff's obligation to obtain the DEIA Final Report from the Environment Impact Authority for the reclamation, construction and

completion of the project (cl 3(c)). The defendants submitted that it was a fundamental express term of the JVA/SA that the project was subject to the DEIA Final Report being approved by the relevant authority. Despite D1's letter dated 5 May 1998 to defer the project the plaintiff as instructed continued to perform its contract obligation under the JVA/SA and that included to obtain the approve DEIA Final Report. The DEIA Final Report is a very serious contentious issue between the parties for without it, the project could not proceed. It is the stance of the defendants that the rejection of the approved DEIA Final Report by the State Environmental Protection Department (SEPD) had frustrated the performance of the JVA/SA. I will discuss this when I address the issue of frustration.

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[40] Now back to the undertaking and obligation of the plaintiff to obtain the approved DEIA Final Report. The evidence showed that the process of assessing the environmental impact of the project and the mitigation measures had taken the plaintiff over three years since it was commenced after the JVA/SA was entered. The evidence also showed that this is one approval that had taken the plaintiff much time and which according the plaintiff was difficult, extensive, expensive and onerous. But there's no two ways about it, this approval must be obtained in order for the plaintiff to commence the project.

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[41] The plaintiff obtained the approved DEIA Final Report on the 6 August 2001 with conditions from the Federal Department of Environment (FDOE). The evidence also showed that prior to giving its approval to the DEIA Final Report, the FDOE being fully aware of the coming into force of the State Conservation of Environment Enactment 1996 and the Conservation of Environment (Prescribed Activities) Order 1999 wrote to the Director of State Environmental Protection Department (SEPD) to enquire whether SEPD should approve the DEIA Final Report or otherwise. FDOE wrote two letters to SEPD dated 13 February 2001 (pp 377–378 AB2) and dated 9 May 2001 respectively (p 379 AB2). The Director of SEPD at that time was Datuk Eric Juin (DW2) and he replied vide his letter dated 13 July 2001 (pp 382–383 of AB2) informing FDOE that since the DEIA process had been managed by FDOE at the outset, then the approval of the DEIA Final Report should be done by the FDOE. The evidence also showed that DW2 had consulted both the State Attorney General (SAG) and the Chief Minister (CM) of Sabah before he informed the FDOE to approve the DEIA Final Report. I find as fact that DW2 needed to consult the SAG for his advice on the two letters from FDOE and DW2 had to also consult the CM who was also the Minister in charge of SEPD for his instruction before DW2 replied those two letters from FDOE. I also find as fact that D2 (through the SAG and CM) cannot denied that it had given instruction to DW2 to write the said letter dated 13 July 2001 (pp 382–383 AB2). DW2 having received the instruction

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- A from SAG and CM then informed FDOE to approve the DEIA Final Report which FDOE did on the 6 August 2001. It is therefore my view that as at 6 August 2001, the plaintiff had fulfilled its obligation on having obtained the approved DEIA Final Report as required under 3(c) of the JVA/SA. But then 14 months later, on the 21 October 2002, the approved DEIA Final report was rejected by SEPD (pp 417–422 of AB3).
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Judicial review

- C [42] In order to protect the interest of both the plaintiff and D1, the plaintiff had to mount a challenge on the decision of the Director of SEPD by judicial review ('JR') to quash the decision on the ground of abuse of power in that the decision was unlawfully made. The JR was quickly filed by the plaintiff in 2002. The High Court ('HC') however took exceptional length of time to decide and finally on the 19 April 2013 after 11 years, it dismissed the plaintiff's JR (the Order is at pp 800–801 of AB5) but on appeal, the Court of Appeal ('COA') on 10 November 2014 allowed the plaintiff's appeal, setting aside the HC's decision and directed that the Director of SEPD must hear the plaintiff before it could decide whether to reject the approved DEIA Final Report (order is at pp 802–803 of AB5). There was no application by SEPD for leave to appeal to the Federal Court. It is therefore my view that the COA's Order is the final judgment on the SEPD's decision made on 21 October 2012, that its decision being unlawful, it was quashed (see DW2's evidence at lines 10559–10589 at pp 167–469 of NOP) (see para 30–33 SAF). I should reiterate, the approved DEIA Final report 6 August 2001 remained valid. My discussion on this will continue when I discuss on the issue of frustration.
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Notice of termination (NOT)

- G [43] The evidence showed that the plaintiff had written letters during and after the final judgment in the JR proceedings to D1 to remind it of the parties' obligations under the JVA/SA before even the plaintiff deciding to terminate the contract. The evidence showed that the plaintiff had always until the contract was terminated given D1 all the due co-operation that as required for the performance of the JVA/SA. The plaintiff had in fact cooperated with D1 when it informed the plaintiff vide its letter dated 5 May 1998 that D2 intended to defer the project to three or five years due to the economic downturn but at the same time informing the plaintiff could carry out survey and conduct studies on the environment aspect and marketing the project. The plaintiff had in fact obtained the DEIA Final Report approved by the FDOE.
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[44] The plaintiff also submitted that the attitude of good faith towards D1 was maintained throughout by the plaintiff. Even before and after the High Court decision on the JR action was delivered, the plaintiff had through its

solicitors' letter dated 6 August 2012 (pp 559–560 AB3) and another letter dated 9 April 2014 (561–562 of AB3) written to D1 stating, amongst others, the present status of the project and that the plaintiff remained ready and willing to perform the JVA/SP. In the said letter the plaintiff also enquired on the news at that time of an impending bill to bar development on the city's seafront, and requested that D1 state to the plaintiff, its joint-venture partner, whether D1 still had the intention of proceeding with the project. D1 did not reply to either of the plaintiff's letter dated 6 August 2012 or the letter dated 9 April 2014.

[45] Due to no response from D1, the plaintiff was left with no choice but to instruct its solicitors to issue the NOT on the 10 August 2015 (pp 567–570 of AB3). In the NOT, the plaintiff highlighted D1's failure to fulfil its obligation under cl 2(b) of the JVA, namely to procure the issuance of the title deed to the said land free from encumbrances within a reasonable period as well as D1's failure to co-operate reasonably with the plaintiff to pursue the objective of the joint venture. The plaintiff had also intimated to D1 that it accepted D1's repudiation of its obligations which D1 was bound to perform subject to the terms of the NOT and that the plaintiff elected to terminate the JVA as provided under cl 8 of the JVA, as varied by the SA, by giving D1 90 days' notice to rectify D1's default or breach (cl 8 JVA).

[46] The evidence showed on 2 September 2015, D1 replied (at pp 571–572 of AB3) by stating among others, that because of the economic downturn mentioned in its letter dated 5 May 1998, the JR proceedings, and the enforcement of the law barring seafront development in Kota Kinabalu, the said land was affected. D1 then offered to mutually terminate the JVA/SA. The defendants also raised the address stated in the plaintiff's letters (dated 6 August 2012, 9 April 2014, 7 January 2015 and 27 May 2015) and submitted it was no longer its registered address.

[47] Let me quickly address this issue of the D1's address. PW4's evidence was that, he delivered these letters to persons authorised to receive the same, according to instruction given to him by the plaintiff's solicitors and that the letters showed the person who actually received them for D1. The plaintiff also submitted that DW4, a director of the D1 did not indicate or complain that those letters were not received by D1 in his reply letter dated 2 September 2015 and that despite DW4 having had the assistance of State Attorney General (SAG) in drafting his reply (his cross-examination evidence at lines 11969–11987 at pp 529–530 of NOP). This is my view. If D1 had not received those letters from the plaintiff as alleged then it makes sense and it is logical to raise the same in D1's letter dated 2 September 2015 because there had been already several earlier letters purportedly delivered to D1. I am also of the view that SAG who was advising and drafting letter for D1 should have put the

A plaintiff on notice that those letters were not received. I therefore find D1's reasons for allegedly not having received the plaintiff's letters dated 6 August 2012 and 9 April 2014 are without any basis and afterthought. In any case the D1's registered address is part of the agreed facts (para 1 SAF).

B [48] Now back to D1's letter dated 2 September 2015. On 15 September
C 2015, the plaintiff's solicitors promptly replied D1's letter of the 2 September
D 2015 (pp 573–575 of AB3) stating, amongst others, that, the supposed barring
E of Kota Kinabalu seafront development was an event that D1 would have appreciated and could have pre-empted and prevented, and hence D1 ought to have protected the parties' mutual interests in the JVA/SA especially since the letter of offer to alienate the said land was already accepted and the 50% of nominal premium had been paid. The plaintiff also re-iterated that D1's failure to procure the issuance of the title deed under cl 2(b) was a breach of a condition or fundamental term of the JVA as such, it was not a question of agreeing to mutually terminate, but rather, the plaintiff had elected to terminate for D1's default or breach and the plaintiff was therefore discharged from further performing the contract with its right to claim damages against D1. There was no further respond from D1. Then the plaintiff issued the NOT dated 10 August 2015 on D1.

[49] The defendants took issue on the NOT. The defendants submitted that under cl 8 of the JVA/SA the plaintiff had to issue two 90 days notices ie a 90-day notice to rectify and then followed by another 90-day notice of termination which the defendants alleged, the plaintiff had strictly not complied with. To support this argument, D1 submitted that PW1 had purportedly admitted the defendants' construction of cl 8 (see lines 2495–2500 of PW1's evidence pp 106–107 NOP). The plaintiff however submitted, the defendants had failed to refer to PW1's evidence immediately before and after his purported admission of the defendants' construction of cl 8 (lines 2495–2500 of PW1's evidence pp 106–107 NOP), which would have shown that PW1 was equivocal on the construction of cl 8 (see lines 2476–2506 at pp 106–107 NOP). This is what Mr Tan Teck Kong (PW1) had said during cross-examination:

H Q: Rainbow Bay Sdn Bhd had through its solicitors' letter dated 10.08.2015 issued a Notice of Termination to MLGH Sdn Bhd. In the said notice, your solicitors had explained that the said notice was issued due to MLGH Sdn Bhd's failure to procure the issuance of title for the 352 acres of the land. Your solicitors had further explained that the said notice was issued pursuant to clause 8 of the JVA/SA. Is this a notice of termination *or* a notice to rectify MLGH Sdn Bhd's purported breach? Refer to pages 567 to 570 of AB3.

I A: I am not a lawyer but my understanding is after looking through the letter on page 569 of AB3, it says 'giving you 90 days-notice to rectify your default or breach'. I am not a lawyer. I may not be able to give you an answer with 100% accuracy.

Roderic: I am required by the rules of procedure to layout the defendants' defences. That is why I am asking you these questions.

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Q: Please refer to clause 8 of the JVA/SA found at pages 23–24 of AAB. Do you agree with me that this clause requires Rainbow Bay Sdn Bhd to serve two notices, i.e. firstly a 90 days Notice to Rectify alleged breaches and then thereafter a 90 days Notice of Termination to terminate the JVA/SA?

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A: Yes.

Q: I put it to you that your solicitors' notice of termination did not comply with clause 8 of the JVA/SA which required a 90 days Notice to Rectify followed by another 90 days Notice of Termination.

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A: No.

[50] The plaintiff also submitted that cl 8 (at p 24 of AAB) does not specify two 90-day notices, but that it is normal in the NOT that a time is allocated firstly, to notify the party in default that the innocent party is electing to terminate future performance under the contract, and secondly, at the same time allows the guilty party to rectify the default stated in the NOT within that same period. The plaintiff also submitted, D1 did not however indicate that it should be given two 90-days period notice in its letter dated 2 September 2015 (pp 571–572 of AB3), even though it had replied under the advice of the SAG and instead, D1 had merely requested the plaintiff to agree to a mutual termination of the JVA/SA because D1 wanted to be discharged from further performing its obligations under the JVA/SA (see para 6 of its letter (p 572)). The plaintiff had further submitted, when its solicitors replied D1's letter on 15 September 2015 (pp 573–575 of AB3), D1 did not also reply and say that it needed another 90-day period or notice. The evidence of Mr Rayman Loudrize (DWS) during cross-examination supported the above account (see lines 12089–12103 on p 535 NOP).

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[51] The plaintiff submitted that the construction of cl 8 is a question of law for the court to determine (see *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38 at pp 44–45; [2004] 3 CLJ 96 at pp 103–104). The plaintiff therefore submitted that D1's contention on issuing two 90 days notices, is wrong in construction, not borne out by the defendants' evidence, and of no consequence since the defendants had evinced its intention in refusing or being able to perform its contract obligation.

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[52] Having read *NVJ Menon*, I agree with the plaintiff that the construction of cl 8 of the JVA/SA, is a question of law and it is for the court to determine. The facts showed that despite having received the NOT dated 10 August 2015, D1 had not raised the requirement of this cl 8 and that too after it had sought the advice of SAG. Instead D1 had requested the plaintiff to agree to a mutual termination of the JVA/SA because D1 wanted to be discharged from further

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- A performing its obligations under the JVA/SA. I am of the view that D1 understood the contents and the true purport of the NOT that is why it had asked for mutual termination of the JVA/SA. It does beg the question, would D1 have complied with cl 2(b) (getting the land title issued) after receiving the second Notice? I do not think so, D1 had made it clear that it wanted a mutual
- B termination when it received the NOT. In any case it is also my view, that issuing the NOT is procedural in nature and if the defendants felt so strongly on the alleged non-compliance of cl 8 for whatsoever reasons (the suit being premature), the defendants could, if it so wished, filed an application to strike out the plaintiff's suit. To raise this issue of cl 8 now, is I think, too late in the
- C day.

- [53] The defendants also submitted that cl 8 expressly provided that the plaintiff can only terminate the JVA/SA, provided that there shall not be any
- D wilful breach on the part of the plaintiff. The defendants had summarised the plaintiff's wilful breach namely, the plaintiff should have procured the issuance of the title deed(s) with the full PA; the demand for the title deed was premature as the Plaintiff had not completed and delivered the D1's entitlement; and the plaintiff should not have relied on the title deed(s) to
- E finance the project when it was its responsibility to do so as the turnkey developer under the JVA/SA. The plaintiff had submitted on this alleged wilful breach which we will discuss in detail in this judgment.

- [54] I will now address some other points and/or allegations raised by both
- F the plaintiff and the defendants.

Plaintiff ready to proceed with the project

- [55] I have alluded to this in my consideration of the JR proceedings. The
- G evidence showed, the plaintiff had informed D1 that it was ready, able and willing to perform its obligations under the JVA/SA. The plaintiff had been consistent in its readiness to implement the project. From day one the plaintiff had proceeded to fulfil its obligations. When the plaintiff received the letter dated the 5 May 1998, the plaintiff proceeded to carry out its obligations. The
- H plaintiff expected the same from D1. Throughout the years 2012 to 2015, the plaintiff through its solicitors had written to remind D1 of its obligations under the JVA/SA. Even before and after the HC's decision on the JR was delivered, the plaintiff had through its solicitors' letter dated 6 August 2012 (pp 559–560 AB3) followed with another letter dated 9 April 2014 (pp 561–562
- I of AB3) update D1, amongst others, the status of the project and that the plaintiff was ready and willing to perform the JVA/SP. Now in one of its letter dated 9 April 2014 and it was out of abundance of caution, the plaintiff had also made enquiry on the news at that time of an impending Bill to bar development on the city's seafont, and requested D1 to state whether D1 still

had the intention of proceeding with the project. I am of the view that the plaintiff was entitled to ask D1 since such legislation would have far reaching effect on the intended project. I find in such circumstances, D1 should have been forthright and should have informed the plaintiff. D1 should have replied immediately. By not replying it showed D1 was not being faithful and was shown to be hiding something negative and adverse to the project.

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[56] After the plaintiff succeeded in the COA, and to show its continuing interest in the project, the plaintiff's solicitors again sent another letter dated 7 January 2015 (p 563 of AB3) notifying D1 of its previous two letters which had gone unheeded and asking once again for D1 to reply. D1 did not reply. Again, the plaintiff's solicitors wrote another letter to D1 dated 27 May 2015 (pp 564–565 of AB3), this time specifically informing D1 that it had succeeded in the appeal before the COA on 10 November 2014, emphasising that the DEIA Final Report was prepared in the performance of the plaintiff's obligation under the JVA/SA, and that the plaintiff had pursued the JR to protect both the plaintiff's and D1's mutual interests in the project. In this letter dated 27 May 2015, the plaintiff gave D1 one month to reply whether it still wanted to proceed with the project, since D1 would need to perform its obligations under the JVA/SA. Eventually D1 replied the plaintiff's letters on the 2 September 2015. D1 excused was that it had not received the plaintiff's letter as the D1 was no longer using the addressed used by the plaintiff. I have already discussed this and gave my reason that in fact D1 had received or deemed to have received the plaintiff's letter. I am of the view the evidence showed that the plaintiff remained very interested in ready to proceed with the project.

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D1's lack of co-operation and lack of good faith

[57] The plaintiff took issue on D1's lack of co-operation and lack of good faith in its performance of the JVA/SA. I am of the view, the plaintiff was also referring to D1 not replying promptly on the plaintiff's letters dated 6 August 2012 (pp 559–560 AB3) and dated 9 April 2014 (pp 561–562 of AB3), not updating on the present status of the land title, no answer on the impending bill to bar development on the city's seafront, and whether D1 still had the intention of proceeding with the project as well as fulfilling D1's obligations. The plaintiff contended being joint-venture parties in the project, both the plaintiff and D1 are akin to partners and the plaintiff would have expected conducts akin to that shown between partners in their respective dealings and mutual performance of obligations under contract. The plaintiff submitted D1 had failed in these duties under the JVA/SA. The plaintiff had referred to *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474 at p 479 (SC) and *Timur Permai Holdings Sdn Bhd v Soon Seng Plywood & Timber Sdn Bhd (No 2)* [1998] 3 CLJ 408 at p 415).

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A Plaintiff losing interest in the project.

[58] The defendants submitted that having failed to prematurely obtain the title deed(s), the plaintiff was in breach of the JVA/SA and therefore the plaintiff had lost interest in the project. The defendants listed the following circumstances:

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- (a) a bank/corporate guarantee was never furnished to D1 despite having demanded and obtained the full PA from the D1 as required under cl 5 of the JVA/SA;
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- (b) a detailed development plan must be submitted to the local authorities within six months from the date of the letter of offer which the plaintiff never did offer to alienate land dated 27 May 1998 at pp 29–35 AAB); and
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- (c) to submit the detailed development plan and all the other necessary plans to the local authority for approval, within 14 months after the DEIA Final Report was approved on 6 August 2001 by DOE, which the plaintiff did not do.

E [59] The plaintiff submitted that since the JVA/SA comprised of reciprocal promises, the plaintiff is not bound to perform its obligations unless D1 is ready and willing to perform its contract obligations. The reciprocal promises between the parties includes the construction, completion and delivery of D1's

F entitlement (cl 4(a)), the plaintiff's entitlement consisting of 150 acres with land title (cl 4(b)(i)), D1 giving PA to the plaintiff (cl 5(a) and (b)). The plaintiff submitted that it had fulfilled its undertaking and obligations but D1 was only able to get the letter of offer and had given the PA to the plaintiff and that this had been the status even up to the issuance of the NOT.

G [60] Having considered the evidence, the defendants' assertion that the plaintiff had lost its interest in the project is without basis. I find that it is vice versa. When D1 informed the plaintiff that D2 needed to defer the project for three to five years due to the economic situation, the plaintiff cooperated and

H continued to fulfil some of the preliminaries as well as to vigorously pursue the approval of the DEIA Final Report which the plaintiff obtained. The plaintiff continued to register its interest in the project by reminding and continuing to remind D1 to get the land title to the said land as well as land titles for the 202 acres and 150 acres but D1 chose to remain non-responsive. It would appear

I after informing the plaintiff on the deferment of the project for three to five years until the economic situation improved, D1 somehow was not bothered to fulfil its obligations. I also find as fact that the defendants seemingly became disinterested after the rejection of the approved DEIA Final report by SEPD and that despite several reminders in writing, D1 chose not to reply. I have

already discussed this point in depth in my discussion on the issuance of the land title for the said land, the DEIA Final Report and the PA. I shall not repeat them.

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Plaintiff's premature demand of the plaintiff's entitlement

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[61] The defendants submitted that the plaintiff's premature demand of the unencumbered title to the plaintiff's entitlement is clearly in breach of cl 4(a) and (b)(i) of the JVA/SA. The defendants asserted that the real reason for this was because the plaintiff wanted to charge the titles in order to obtain finance for both the D1's Entitlement and the plaintiff's Entitlement. The defendants had referred to PW1's statement in re-examination (lines 3147–3155, 3240–3253 NOP).

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[62] The plaintiff submitted that it had never made a demand for the 150 acres to be registered or transferred to its name before the completion of the project otherwise there would be no requirement of the PA, in particular cl 13, for the plaintiff to be granted the power to charge the D1's said land. The plaintiff submitted for any title to be issued, whether for the said land (352 acres) or the 150 acres, the titles were to be issued to and in the name of D1 and only when the defendants' entitlement is delivered to D1, then the 150 acres would be transferred to the plaintiff.

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[63] It is not disputed that the plaintiff's consideration is the 150 acres (cl 4(b)(i)). There is also no dispute that both the plaintiff and D1 had submitted their respective land applications for 202 acres for D1 and 150 acres for the plaintiff and that the parties had met with the Director of LSD on the premium (cl 4(b)(ii)). But nothing came of it. It did not materialise. In the end parties were prepared to pursue only for the said land (352 acres) for the project (see para 6 SAF). I need also to stress here, that D1's obligation under the JVA/SA is to get the said land. That is the first step. But sadly, D1 had not obtained the land title to the said land which was a fundamental term of the contract.

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Plaintiff was in breach of the JVA/SA

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[64] The defendants contended that the plaintiff was in serious breach of cl 3(a) of the JVA/SA since this clause states that the plaintiff was to provide financing of the project from its own resources. The defendants submitted that the plaintiff's motive behind the premature demand of the title deed(s) was clear in that the plaintiff was clearly seeking to charge the title deed(s) to obtain financing for the project when cl 3(a) of the JVA/SA as well as the nature of a turnkey developer required the plaintiff to provide the finance from its own resources to complete and deliver the D1's entitlement.

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- A [65] The plaintiff submitted that it is not in breach of cl 3(a) of the JVA/SA. The plaintiff submitted that under the JVA/SA, the plaintiff is empowered to charge the said land to finance the development of the project provided that the plaintiff had furnished a corporate or banker's guarantee in the amount or RM160m only to D1 (cl 5(b) of the JVA/SA, cl 13 of the PA). The plaintiff also submitted that D1 was protected from the risk of loss by the corporate or banker's guarantee furnished by the plaintiff. The plaintiff submitted cl 3(a) must be interpreted within the context of the contract as a whole, so that the contract provisions are harmoniously interpreted which specifically permitted the said land to be charged to the banks provided the plaintiff would be the one liable for any shortfall if the said land was foreclosed (see K Lewison, *The Interpretation of Contracts* (2nd Ed, London: Sweet & Maxwell, 1997) p 156). The plaintiff also submitted that this point was not pleaded and neither PW1 nor any of the plaintiff's witnesses cross-examined on this point as such the defendants could not raise this point in their submissions.
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- E [66] I am entirely in agreement with the submission of the plaintiff on this breach of cl 3(a), that this was not pleaded therefore the court need not consider the same (see *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665 at pp 679–680; [2010] 2 MLJ 188 at pp 201–202 (FC)). In any event, I am of the view from the agreed facts the plaintiff is entitled to charge the said land to part finance the project (see para 14 SAF).
- F [67] Now I must answer this issue (i). I bear in mind that the test is to ascertain whether the action or actions of D1 and D2 respectively are such as to lead a reasonable person to conclude that the defendants no longer intend to be bound by the JVA/SA; that in order to decide if the JVA/SA has been repudiated, the main consideration is whether there is a total failure of consideration, by virtue of the words in s 40 'his promise in its entirety' and that such repudiation may be inferred through the combined effect of a party's action or inaction over a period of time.
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- H [68] To recap. The evidence showed D1 had only obtained for the plaintiff the letter of offer and had given the plaintiff the PA. Most importantly D1 had not been able to get D2 or LSD to issue the land title for the said land (352 acres) which is a fundamental term of the contract for without the land title the project could not move on. I see no reasons why D1 could not in the meant time, while waiting for the economic situation to improve, proceed to fulfil its obligations by applying for the issuance of the land title to the said land and also the removal of the prohibition of the conditions on transfer, subdivision, sublease, and to charge the said land. D1 is in fact required to do so under the JVA/SA. D1 needed no reminders on its obligations since the same are stated under the JVA/SA. The plaintiff had in fact reminded D1 of its obligations.
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There is good reason that D1 must get the land title issued so that when D2 see that the economy had improved then it could order the plaintiff to immediately proceed with the project.

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[69] From my consideration of the evidence, D1 is no ordinary company, its D2's company, it is specifically incorporated as D2's vehicle for commercial purpose. D2 had in fact authorised D1 to enter into a joint venture with the plaintiff. In such a relationship, I see no reason why D1 was unable to get things done. D1 surely had the ears of the state government and LSD. I find D1 was not prepared or unable to comply with their part of the obligations as stipulated by the JVA/SA. I can only say, D1 recognised its position as the alter ego of D2 and had to listen to D2 and get instruction. It was as though D1 would refuse to do anything unless instructed by D2. D1 must only act with the approval of D2. Take for example the letter dated 5 May 1998 which made reference to the deferment of the project for three to five years. I find D2 had instructed D1 to write that letter and then sent the same to the plaintiff. It is very clear from reading the letter. After sending that letter D1 had remained incognito and took a backseat and to resurface only upon receiving the NOT and after getting instruction from D2 then only it replied the NOT.

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[70] The evidence also showed that D2 was very much involved in rejection of the DEIA Final Report by the Director of SEPD. The evidence showed that the Chief Minister (CM) of Sabah who is the head of the state government was directly involved in rejecting the DEIA Final Report. The Director of SEPD being a civil servant likewise had to obediently follow the CM's order and what more it also happened at that material time the CM was also the minister in charge of SEPD.

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[71] It is a fundamental term of the JVA/SA that the plaintiff must obtain the DEIA Final Report. The plaintiff had worked hard and incurred much expenses to obtain this DEIA Final Report for without it the project could not proceed (cl 3(c)). The DEIA Final Report was approved by the FDOE on 6 August 2001. It was approved by FDOE after consultation with SEPD on who had the jurisdiction to do so and it is a fact that SEPD agreed for FDOE to approve (see para 28 SAF). I have already discussed this issue of jurisdiction in details in the early part of my judgment which also showed the direct involvement of D2 in rejecting the approved DEIA Final Report. I find that again it was D2 who had instructed DW2, the Director of SEPD to reject the already approved DEIA Final Report. I find that the D2's conduct in instructing the D1 to reject the DEIA Final Report was not done in good faith. I also find that DW2 had never exercised his discretion properly, but he was subjected to his political master namely the CM who was also his minister. I therefore find the so-called purported exercise of discretion to reject the already approved DEIA Final Report was no exercise of discretion. It was made in bad

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A faith. I find that the rejection amounted to a repudiation of the JVA/SA entitling the plaintiff to terminate the same. My finding is also supported by the fact that the COA had made a decision in allowing the plaintiff's appeal; it spoke volume of the unlawful decision of the SEPD in rejecting the already approved DEIA Final Report.

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[72] The evidence showed that there was indeed an intention not only to delay the project but to ensure that it would never be implemented by the plaintiff. So, the modus operandi is for D1 to issue the letter dated 5 May 1988 to the plaintiff to delay the project for three to five years; not to do anything such as to apply for the land title; to make sure the plaintiff could not enter the said land by getting permission from the LSD. In all of these D2 was very much involved. The evidence showed that D2 had a hand in D1's issuing the letter dated 5 May 1998. D2 was definitely involved to ensure the Director of LDS would never issue the land title or any other permits to enable the plaintiff to enter the said land. D2 was directly involved by making sure the Director of SEPD reject the DEIA Final Report. D2 had also introduced s 9A which prohibits the development of the said land. This had sealed the fate of the JVA/SA and doomed to failure. I find D1 and D2 are both responsible, by their conducts showed that they had conducted in repudiation of D1's contract obligations under the JVM/SP as they evinced a clear intention that they are unwilling, unable and not ready to perform the entire contract obligations.

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[73] The cumulative evidence clearly showed that D1 had refused or was unwilling or unable to perform its contract obligations in its entirety. I cannot but re-emphasised my finding that there is a total failure of consideration on the part of D1 to obtain the land title to the said land within a reasonable time. D1 had stopped pursuing the waiver of the premium, the removal of the conditions on transfer, sub-division, to charge the said land. D1 had issued the letter dated 5 May 1998 to delay the project for three to five years. D1 was taking instructions from D2 not to perform its obligations. There was direct involvement of D2 to ensure D1 kept quiet and not to comply with the contract. D2 was directly involved in rejecting the approved DEIA Final Report. D2 was bent on ensuring that the project must not proceed by legislating s 9A. This is very clear to me from the cumulative evidence. In answering this issue, I am conscious that the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by the provisions of the contract. I am also conscious that such repudiation may be inferred through the combined effect of a party's action or inaction over a period of time. Based on the evidence adduced and on balance of probabilities, I so found. I therefore answer issue (i) in the positive. Now we discuss issue (ii).

Whether the second defendant had induced or procured the first defendant to break the JVA/SA

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[74] The plaintiff's causes of action against the defendants are for breach of contract and/or repudiation against D1, and/or D2 as the principal behind D1, of the JVA/SA and further or alternatively, the tort of inducing or procuring the breach of contract against the D2 for having directly or indirectly induced or procured D1 to break the JVA/SA. The plaintiff also submitted damages under either of the two cause of action would be similar which will be discussed in the later part of this judgment.

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[75] The plaintiff submitted that the further concurrent cause of action against D2 for committing the tort of having induced or procured D1 to breach the JVA/SA is also established on the same set of facts as proved by evidence admitted before the court which is an even clearer case for D2's liability to pay damages to the plaintiff.

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[76] The defendants submitted that the plaintiff's causes of actions against D2 are inconsistent because one of its cause of action against D2 is based on the contention that D2 is the principal of D1 and the other cause of action against D2 is because D2 purportedly induced or procured D1 to breach the JVA/SA. The defendants contended that the plaintiff's two pleaded causes of action against D2 are clearly self-contradictory for reasons that the plaintiff cannot in the same breath elect and say that D2 is liable as the principal of D1 and also liable for inducing and procuring its own self to breach the JVA/SA.

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[77] The defendants submitted that based on the plaintiff's own submission on the five elements for the tort of inducement or procurement of a breach of contract showed that the said tort requires three parties, a contractor, a contractee and a third party and that since the plaintiff had submitted that D2 is the principal of D1, it meant that there is no third party involved on the facts of this case. It is also the defendants' submission that since the plaintiff is alleging that the FDOE's restricted letter had induced or procured D2's change of heart, the plaintiff should have made the FDOE a party to this action. I have read the pleadings nowhere is this proposition of making FDOE as a party pleaded by the defendants. The court therefore needs not address the same.

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[78] The plaintiff submitted that D2, with knowledge of the JVA/SA and with intent to interfere in D1's performance of the contract, had prevented or hindered D1 from performing its contract obligation by unlawful means and with no justification causing it to refuse to perform or further perform the contract to the substantial damage of the plaintiff. The plaintiff contended that the five elements of the tort are hence satisfied (see *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105 at p 108).

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- A** [79] The plaintiff had referred to the five elements or conditions of the tort, listed in *Greig v Insole; World Series Cricket Pty Ltd v Insole* [1978] 1 WLR 302, which were adopted by the Federal Court in *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105 at p 108:
- B** At common law it constitutes a tort for a third person deliberately to interfere in the execution of a valid contract which has been concluded between two or more other parties, if five conditions are fulfilled:
- First, there must be (a) ‘direct ‘interference or (b) ‘indirect’ interference coupled with the use of unlawful means; see per Lord Denning MR in *Torquay Hotel Company Ltd v Cousins* [1969] 2 Ch 106, 138.
- C** As to the meaning of ‘interference’ this is not confined to the actual procurement or inducement of a breach of contract: it can cover a case where *the third person prevents or hinders one party from performing his duties* even though this be not breach.
- D** Secondly, the defendant must be shown *to have knowledge of the relevant contract*. Thirdly, he must be shown to have had the *intent to interfere with it*. *Fourthly, in bringing an action, other than a quia timet action the plaintiff must show that he has suffered special damage, that is more than nominal damage; see Rookes v Barnard* [1964] AC 1129, 1212, per Lord Devlin.
- E** Fifthly, so far as it is necessary the plaintiff must successfully rebut any defence based on justification which the defendant may put forward. (Emphases added.)
- F** [80] I should also refer to the case of *Transwater Tenaga Sdn Bhd v Aps Technologies Sdn Bhd & Anor* [2007] 1 MLJ 301; [2007] 1 CLJ 159 (CA) where the Court of Appeal states the following at p 312 (MLJ); p 172 (CLJ):
- [21] The learned trial judge had rightly stated that to succeed in a claim of inducement of breach of contract, five conditions must be satisfied. This is as set out in the case of *Greig v Isole* [1978] 3 All ER 449 *and accepted by our Federal Court in the case of Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105. They are, inter alia, as follows:
- G** (a) there must be direct or indirect interference, coupled, with the use of unlawful means;
- H** (b) the defendant must be shown to have knowledge of the relevant contract;
- (c) the defendant must be shown to have the intention to interfere;
- (d) the plaintiff must show that he has suffered special damages, that is, more than nominal damages; and
- I** (e) so far as it is necessary, the plaintiff must successfully rebut any defence based on the justification which the defendant may put forward.

[81] I have more or less touched on these five conditions when I was discussing on D2’s role and/or its involvement in D1’s repudiation and

whether the contract was frustrated or self-induced. For purpose of completion, I shall now consider the evidence to determine whether the plaintiff has proved the requisite five conditions in a claim of inducement of breach of contract to entitle the plaintiff to succeed in its claim against D2 premised on this aspect of the tort.

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The state government's knowledge of the contract

[82] I start with condition (b) which is D2's knowledge of the JVA/SA. D1 is wholly owned by D2. D1 is specially incorporated to undertake the project. The State Government of Sabah through the Ministry of Local Government and Housing had authorized and empowered D1 to enter into the JVA by a letter dated 3 April 1997 and this was stated in Recital 5 of the JVA. D1 had also represented to the plaintiff at Recital 2 of the JVA that it had applied under Land Application No 96010390 to the State Government of Sabah for approximately 1,200 acres more or less in the District of Kota Kinabalu (see paras 4 and 5 SAF). Subsequently, the plaintiff and D1 had also signed the supplementary agreement (SA) (see para 2 SAF). I find as facts that D2 had knowledge of the JVA/SA, entered into, between D1 and the plaintiff.

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Interference and intention to interfere coupled with unlawful means by the state government (D2)

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[83] I now address conditions (a) and (c). I am of the view they can be considered together as they are closely connected. The two conditions would require discussion on D2's intention to interfere, whether direct or indirect coupled with the use of unlawful means. First let us understand the makeup of a government. In the context of the Sabah State Government (D2), this consisted of the chief minister who is the head of government, other ministers, a whole host of civil servants which include the state secretary, permanent secretaries, directors of departments and etc. Now we discuss whether D2 had the intention to interfere or had interfered in D1's performance of the contract by unlawful means and with no justification.

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[84] The plaintiff submitted the evidence showed that D2 had the requisite intent to indirectly interfere with D1's performance of its contract obligations in that D1 had been prevented and hindered in the further performance of its obligations under the JVA/SA. I had already discussed D1's obligations (see paras 7, 12, 13, 15 SAF)

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[85] We start with the approved DEIA Final Report. The plaintiff submitted by deliberately causing a situation where the plaintiff's active pursuit of obtaining approval of the DEIA Final Report was hindered by D2 in using its servant, the Director of SEPD to unlawfully reject the DEIA Final Report,

A resulting in D1 breached of its contract obligations under the JVA/SA. The plaintiff identified four breaches of the contract obligations.

B [86] As I have adverted to in the early part of this judgment, the plaintiff must obtain the DEIA Final Report for without it the project could not proceed (see cl 3 JVA and para 9 SAF). The evidence showed the plaintiff had worked hard to process the DEIA Final Report. It took the plaintiff over three years to process the environmental impact of the project and the mitigation measures. Then there was issue whether it is the FDOE or SEPD was to approve the DEIA Final Report. The Director of SEPD gave clearance for the FDOE to approve after the Director of SEPD having consulted the CM and SAG (see para 28 SAF, pp 377–378 AB2, p 379 AB2, pp 382–383 of AB2 and DW2 evidence lines 10626–10639 pp 470–471 NOP). The evidence showed that the DEIA Final Report was eventually obtained when the FDOE approved it on 6 August 2001 (see para 25 SAF). On receiving the approved DEIA Final Report, the plaintiff expeditiously proceeded to comply with some of the requirements such as completion of the Forms PPE1 and PPE2 (see pp 425–461 of AB3). But 14 months later, on the 21 October 2002, the approved DEIA Final Report was rejected by the Director of SEPD (pp 417–422 of AB3).

F [87] Now on the four breaches. First is the refusal on the part of D1 to procure the land title. There is no dispute that its D1's obligation (see cl 2(b) JVA/SA). There is no issue on the letter of offer to Alienate which had been signed by D1 and 50% of the premium was paid in June 1998. There was also resolution between the plaintiff, D1 and the Director of LSD on the 30 September 1998 on the issuance of the land title. I have also discussed this in the early part of this judgment. Amongst others, I was of the view that because of D1's position, it being a D2's company and D2 being the state government who has control of state land, D1 surely was able to have the land title issued within a reasonable time. I considered three years to be sufficient time for D1 to get the land title.

H [88] But for the issuance of the land title, D2 had the last say. The plaintiff submitted '... by deliberately creating the obstructive event, D2 had caused an event which targeted the substratum of the JVA/SA'. The plaintiff went on to submit D2, '... had created a situation in which there will obviously no longer be any willingness on the part of the first defendant to procure the title deed for the said land, for the second defendant's intention was that there should be no development, and thus no necessity for procuring title for the said land'.

I [89] On the rejection of the DEIA Final Report. I agree with the plaintiff on the facts, D2 had used DW2 to abuse his power to reject the already approved DEIA Final Report. I have stated in the early part of this judgment that DW2

had not properly exercised his discretion because he was taking instruction from the CM. I have also discussed the roles of DW2, the Director of SEPD, the SAG, and the CM, they were all part of the state government (D2), in making sure the project would not proceed. I have also stated that the plaintiff was vindicated when the COA allowed its appeal and ordered the Director of SEPD to hear the plaintiff. I also agree with the plaintiff that since there was no application for leave filed by D2, the decision of the COA remains a valid order. The plaintiff submitted 'This issue is incontrovertible based on the Court of Appeal's final judgment confirming that the unlawful decision is quashed'. Yet D1 and for obvious reason, it being under the control of D2, had remained silent and continued to breach its obligations which included its failure to obtain the land title to the said land. Clearly the evidence showed that D2 had indirectly interfered through the unlawful means of the Director of SEPD's unlawful decision in rejecting the already approved DEIA Final Report. With the rejected DEIA Final Report and it being a fundamental term of the JVA/SA, D1 no longer see the need to proceed with the project.

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[90] The other three breaches identified by the plaintiff include D1's failure or refusal to procure issuance of the temporary occupation licence for the said land (see cl 2(c) of the JVA), D1 had failed to co-operate with the plaintiff in the performance of the JVA/SA though this is a duty arising out of the nature of a joint venture transaction as already explained above and D1 failed to act in good faith in the performance of the JVA/SA. I have also discussed all these in my judgment above and I have to say D1 being wholly owned company of D2 is prohibited by D2 from performance of its contractual obligations. The situation is this, it is very clear so long as D2 still wanted the project, D1 will perform its obligations under the JVA/SA. But the situation had changed, D2 had changed its mind on the project it no longer wanted the project and had accordingly interfered by instructing the Director of SEPD to reject the already approved DEIA Final Report. I am also of the view D2 would have also instructed the Director of LSD not to process the issuance of the land title to the said land and LSD has to comply since it's a government department directly under the CM.

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[91] On element (d) which is on damages suffered by the plaintiff. The plaintiff says this '... this is substantial and not nominal. The plaintiff has lost the benefit of the JVA/SA and lost the bargain and profits it would otherwise have made, and it had been injured in its business and has been put to considerable trouble, inconvenience and expense. In short, the plaintiff had lost the contract that is the JVA/SA and all which the contract entails and would yield as to be expected in a commercial contract'. I agree. The plaintiff had paid RM1m as deposit with no interest, paid the premium of the land, incurred substantial expenses in the preparation of the DEIA Final Report and

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- A having lost of the benefit of the JVA/SA, the plaintiff is expected to claim substantial damages and it is all due to the interference of D2.

- B [92] On the last element (e), justification as a defence to inducing the breach of contract. This the defendants are required to plead. The plaintiff submitted the defendants had no such defence pleaded (see re-amended defence para 27A at p 30 of BP). The defendants had also not stated justification in their opening speech (see pp 396–398 NOP). I have read the BP and the defendant’s opening speech; I agree with the plaintiff that justification had not been pleaded and neither stated so in the defendants’ opening speech. On this reason the court needs not consider whether there was justification or at all. Parties are bound by the pleadings.

- D [93] But the plaintiff being cautious had raised whether the defendants could rely on para 6 of the restricted letter dated 6 August 2001 as justification for inducing the breach of contract. I have discussed in my judgment how this restricted letter came about. The evidence showed that the FDOE had sent this restricted letter to the State Secretary (SS) and copied to director of SEPD but not copied to the plaintiff. DW2 in his evidence had said that since para 6 had indicated that at the public forum the public had objections to the project because of the adverse impact on the environment and also the review panel had commented on these and that since the FDOE had stated that D2 (the State Government) could still consider whether to approve the project, D2 had then formed the task force headed by DW2 to consider para 6 of the restricted letter. And subsequently DW2 rejected the already approved DEIA Final Report.

- G [94] The plaintiff submitted that the rejection of the approved DEIA Final Report by DW2 was because the FDOE had allegedly acted wrongly in that it had not considered the public objections in conditionally approving the DEIA Final Report (see lines 11099–11137 at pp 492–494 NOP). The plaintiff submitted that the evidence showed conclusively that the FDOE had in fact considered the public objections in approving the DEIA Final Report, that the public objections were dealt with and were in fact made as conditions to the approval under the approval letter dated 6 August 2001 issued to the plaintiff as expressly stated in the enclosed attachment therein (see paras 3 and 4 pp 386–387 of AB3 (approval letter), pp 393–400 of AB2 (attachment) and para 5, p 411 of AB3 (restricted letter)).

- I [95] When DW2 was shown these contemporaneous documents (see paras 3 and 4 pp 386–387 of AB3 (approval letter), pp 393–400 of AB2 (attachment) and para 5, p 411 of AB3 (restricted letter)), he admitted during cross-examination that the FDOE had in fact fully taken into account those objections to the environment which it had expressly made as conditions for its

approval (see lines 11171–11217 at pp 495–498 NOP). So, from DW2's evidence above, his decision to reject the approved DEIA Final Report was based on his reasoning that FDOE was wrong to approve the DEIA Final Report for it had failed to consider the public objections. But the evidence had shown conclusively that the FDOE had in fact considered the public objections when approving the DEIA Final Report, on the 6 August 2001 (see paras 3 and 4, pp 386–387 of AB2, the attachment at pp 393–400 of AB2) and also the fact that the restricted letter dated 6 August 2001 to the State Secretary at para 5 (p 411 of AB3) also referred to and enclosed the same attachment which have comprehensively dealt with the various impacts on the environment, assessed their impacts and imposed obligations on the plaintiff to comply to mitigate those impacts.

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[96] The plaintiff submitted '... there can be no justification for DW2 to reject the approved DEIA Final Report even on the case put forward by DW2, for the contemporaneous documentary evidence militates against his case.' the plaintiff also submitted '... there can be in law no justification for the second defendant's procurement of the breach of contract for the means it had used through DW2's action has been adjudged by the Court of Appeal in the judicial review proceedings to be unlawful.' I have also discussed the issue of the approved DEIA Final Report and the decision of the COA in the early part of this judgment and I am entirely in agreement that the defence of justification is not available to the defendants.

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[97] As for s 9A which came into effect on the 9 August 2012 (see pp 560(a)–(g) AB3), the plaintiff's submission is this, '... it will be irrelevant and thus wrong to deal with ...' under this action. The plaintiff submitted that the tort of procurement or inducement to breach the contract is complete and all the elements satisfied when DW2 issued his letter to unlawfully reject the DEIA Final Report. I am in agreement with the plaintiff on this. I therefore answer issue (iii) in the positive.

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Whether there was a justification in repudiation of the contract on grounds of frustration alleged by the defendants

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[98] The defendants submitted that a contract is frustrated when there is a change in circumstances which renders a contract legally or physically impossible of performance (*Joseph Constantine Steamship Line, Limited v Imperial Smelting Corporation, Limited* [1942] AC 154) and *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293 at p 303). The defendants had also referred to ss 57 and 66 of the Contracts Act 1950 and ss 15 and 16 of the Civil Law Act 1956 as well as the observation of the learned author, Dato' Sri Visu Sinnadurai (see *Law of Contract* (4th Ed) at para 10.58). The defendants submitted that they would confine their arguments to s 57(2)

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A which provides for the doctrine of frustration and s 66 for the consequences arising therefrom. I am in agreement with the statement of the law on frustration.

B [99] What are the change in circumstances, the defendants' submitted that due to the rejection of the DEIA Final Report by the SEPD and the subsequent enactment of s 9A of the Sabah Land Ordinance (Cap 68) by the Sabah State Legislative Assembly, the JVA/SA had become impossible and unlawful to be performed. The defendants had referred to Court of Appeal case of *Ng Kheng Yong @ Ng Tet Lai v Seng Hup Realty Co Sdn Bhd* [2004] 3 MLJ 477 at paras 42–43.

D [100] The plaintiff submitted that the critical features of the facts here proved that this is a case of a self-induced frustration which do not excuse the defendants from liability in either of the two events relied upon. It is the plaintiff's submission that the defendants cannot use the doctrine of frustration to excuse them from liability in their repudiation and breach of the JVA/SA, for as promisors of the contract obligations they could have prevented the events but did not, therefore the defendants remain liable for failure to perform the contract (s 57(2) of the Contracts Act 1950); *Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors* [2000] 3 MLJ 699 at pp 709–710 (CA)).

F [101] Now we discuss whether the rejection of the approved DEIA Final Report and s 9A of the Land Ordinance (s 9A) amounted to frustration or were they in fact self-induced. The plaintiff referred to them as the two events.

Rejection of the DEIA Final Report

G [102] I start with the SEPD's rejection of the approved DEIA Final Report. I have already discussed on the plaintiff's obligation to obtain the DEIA Final Report, which the plaintiff obtained on the 6 August 2001 (pp 386–388 AB2). I also agree the need to obtain the DEIA Final Report was a fundamental express term of the JVA/SA and that this project was subject to the DEIA Final Report being approved by the relevant authority (cl 3(c)). I find from the 6 August 2001, the status of the approved DEIA Final report had not changed that it was already approved. But 14 months later on the 21 October 2002, the approved DEIA Final report was rejected by the Director of SEPD. The plaintiff submitted that the rejection was one that D2 could have prevented since the Director of SEPD, Datuk Eric Juin (DW2), acted in his capacity as a servant of D2 to unlawfully reject the approved DEIA Final Report. The plaintiff submitted that D2 could have prevented the rejection in abiding with the DEIA Final Report that was already approved by the DOE subject to the

conditions stipulated in the approval, as D2 had already agreed in DW2's letter to DOE on 13 July 2001 for FDOE to approve the DEIA Final Report (pp 382–383 AB2).

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[103] The defendants submitted 'In the light of the said restricted letter, the then Director of the State EPD (who is DW2), had exercised his jurisdiction to reject the DEIA Final Report via his letter dated 21 October 2002' (pp 417–422 AB3). The defendants have referred to DW2's evidence during cross-examination, on the purported rejection of the approved DEIA Final Report (see lines 10822–10845, 10922–10934, 11099–11128, 11130–11137 NOP).

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[104] The plaintiff submitted DW2 'had utilised a restricted letter dated 6.8.2001 from the Director of Federal DOE to the State Secretary of Sabah and copied (amongst others) to him and he referred especially to paragraph 6 of the letter to justify his action in rejecting the approved DEIA Final Report' (see DW2's evidence under cross-examination at lines 10814–10845 at pp 479–480 NOP, lines 11099–11128 at pp 492 493 NOP). The plaintiff also submitted, 'The truth is that DW2 used the supposed failure of the DEIA Final Report (and despite its approval by Federal DOE) to mitigate the impact on the environment which would be caused to the environment if the development were to proceed as the pretext on which to reject the already approved DEIA Final Report' (see DW2's evidence lines 10822–10845 NOP).

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[105] There appeared to be this restricted letter dated 6 August 2001 sent by FDOE to the Sabah State Secretary (SS) which was copied to SEPD but was concealed from the plaintiff, as it was only during the process of discovery in the present suit that this letter was disclosed to the plaintiff. But this restricted letter is also and agreed fact (para 29 SAF). Now we go through this restricted letter for its full effect.

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[106] In rejecting the approved DEIA Final Report, I repeat DW2's evidence: '... the Federal DOE recommended to the State Government to take into account the comments of the review panel and the public objection and these comments and public concern and objection are all related to crucial environmental issue that had not been fully addressed by the report, and DOE in their condition of approval left it to the State Government of Sabah to decide whether to approve or not approve this project based on the public objection and the need of the project'.

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[107] The plaintiff submitted 'The earlier part of the letter informed about the DEIA process which went through the Federal DOE, the State EPD's power over this matter from 1 September 1999 and the fact that the State EPD had specifically requested by its letter dated 13 July 2001 for Federal DOE to

A continue handling this case until approval. It then informed that approval of the DEIA Final Report had been granted subject to conditions as enclosed in an attachment to the letter'. The plaintiff went to submit, 'Then Paragraph 6 of the restricted letter says that nevertheless an issue had been raised by some members of the Review Panel and the public on the need for the project. The same paragraph went on to say that although the effects on the environment have been assessed and control measures proposed, it is recommended that the State Government give due attention to the need of the project and the public's protests toward this project before the decision to approve the project is made'.

C [108] It is the plaintiff's contention that the reasons given by DW2 for rejecting the already approved DEIA Final Report was but a pretext. In so submitting, the plaintiff referred to DW2's evidence in cross-examination which he initially denied as follows (lines 10847–10859 at p 481 NOP):

D Q: The DEIA final report is to assess its environmental impact. That is the whole point. It has already assessed all that you have mentioned and approved it provided the mitigating factors have been planned when the development proceed. What you have just said is going around in a circle. You do not need to approve the DEIA final report if the impact on the environment cannot be mitigated, but here the DEIA final report was approved taking into account those factors. From what you have said it is quite clear that *you went against the approved DEIA final report because the State Government felt between August 2001 and your decision on October 2002 that the State Government did not want the project after all*. Am I correct?

F A: I disagree. (Emphasis added.)

G [109] The plaintiff submitted that despite his denial during the cross-examination, DW2 had admitted that between August 2001 and October 2002, DW2 had communicated with the Minister of Tourism, Culture and Environment who happened to be the Chief Minister at that material time and that DW2 had then assembled a task force to review the approved DEIA Final Report (lines 10908–10934 at pp 483–484 NOP) but DW2 had not informed the plaintiff about this task force which was at work to reject the approved DEIA Final Report between August 2001 until rejection of the Report in October 2002 (lines 10936–10943 at p 485 NOP).

I [110] So what was the pretext here. The plaintiff submitted the Director of SEPD rejected the approved DEIA Final Report on the 21 October 2002, on the pretext of uncertain and insufficient mitigation measures that would not prevent irreversible damage to the environment (see DW2's letter dated 21 October 2002, pp 417–422 of AB3).

[111] The plaintiff also submitted, the decision was only a pretext, for the real reason is simply to abort or frustrate the further implementation of the project

under the JVA/SA though D2 had earlier approved and authorised D1 to enter into the contract and carry out the project. The plaintiff gave three pieces of evidence in support of this fact.

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[112] Firstly, D2 had changed its mind or will in having the project between August 2001 and October 2002. The plaintiff referred to the admission of DW2 in cross-examination:

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Q: The State Government had a change of heart between August 2001 and your rejection letter October 2002 with regard to the whole project. Am I not right?

A: Yes, because the letter from the Director of Federal DOE to the State Secretary at para 6 triggered the State Government to make this change.

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Q: I suggest to you that all the Federal DOE state that the power whether the State Government wants the project to go ahead is within the power of the State. That is what it says, am I not right?

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A: Yes.

Q: The State Government did not tell the Plaintiff that it had change of heart between August 2001 and October 2002, did it?

A: Yes.

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Q: By yes, you mean that the State Government did not tell the Plaintiff of its change of heart. Am I right?

A: Yes.

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(lines 11249–11269 at pp 499–450 NOP)

[113] Secondly, the plaintiff referred specifically to para 6 of FDOE's restricted letter where it testified to the fact that although all mitigation measures were in place and the DEIA Final Report was duly approved, the matter of whether the State Government (D2) still wanted to approve the project rested with D2 who could also take note of the public's objection to the project. The plaintiff submitted para 6 did not recommend to D2 that it could reject the approved DEIA Final Report by forming a task force to carry out this task on the pretext that the DEIA Final Report was somehow wrongly approved.

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[114] Thirdly, the plaintiff had referred to a memorandum of a meeting held on 24 June 2003 evidencing the fact that D2 had changed its mind about implementing the project. This meeting was held at the FDOE's office in Putrajaya, KL on 24 June 2003 at 2.30pm to discuss the JR proceedings filed by the plaintiff against the Director of SEPD (DW2) where DW2 and his assistant Ms Daisy Aloysius, the State Attorney General (SAG) and the Director DOE were present. The memorandum from Ms Aloysius to DW2 dated 26 June

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- A 2003 recorded what was said at the meeting (see pp 475–476 of AB3). Reading para 2(iii) of the memorandum, it was stated that the view and opinion of the State Government toward the project had changed (see p 475 AB3). At para 5, DOE’s position on the DEIA Final Report was re-stated, that is, that its decision to approve the DEIA Final Report was based on the understanding that the effects on the environment had been fully considered in the DEIA Final Report (see p 476 AB3) and para 5 then ended with the statement by the FDOE that a project usually does not commence as long as DEIA report was not approved which in the present case is vice versa (p 476 AB3). DW2 had confirmed the veracity of the memorandum and its contents in cross-examination (lines 11329–11374 at pp 503–505 NOP).
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- [115] But the defendants submitted DW2 cannot speak for the state government (D2). I think the defendants were referring to DW2’s answer during re-examination where DW2 testified, he cannot speak for the D2 (see lines 11506–11521 at pp 511–512 NOP). The plaintiff submits DW2’s testimony did not affect the strength of DW2’s admission of D2 having a change of mind on the project. The plaintiff contended that DW2 definitely had and did speak on behalf of the state government (D2) when DW2 made the admission for he had earlier testified that following the receipt of DOE’s restricted letter dated 6 August 2001 to the SS, DW2 had met up with the Minister of Tourism, Culture and Environment who was also the CM and following that meeting, DW2 then set up a task force to scrutinise the approved DEIA Final Report which led to his decision to reject the same. It is also the plaintiff’s submission that DW2 could and did speak for the state government (D2) since he was clothed with the proper authority being the proper public officer and servant of the D2 entrusted specifically for the task on behalf of D2. I agree with the plaintiff’s submission that DW2 was called as a witness of fact by the defendants on this issue, he is the best person to do so since he was authorised by the CM to carry out the task, after all, the CM is the head of the state government (D2) and was also the Minister of Tourism, Culture and Environment. I would also add that as a civil servant, DW2 is expected to take instruction from his Minister more so when he was also the CM and to implement whatever was instructed in obedience. This is consistent with his statement ‘I am your obedience servant’ which is clearly printed in DW2’s letters (see p 423 AB3).
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- [116] On the defendants’ contention that DW2 cannot speak for the CM, the plaintiff submitted that since the evidential burden is upon the defendants on this point, the defendants had failed to call the CM to testify. Therefore, adverse inference would be drawn against the defendants in that as the CM was readily available in Sabah when the defendants opened their case in May 2018 following shortly after 14th General Election at which time he was seen and reported in the State giving speeches for the Barisan Nasional candidate for the
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Kudat Constituency and yet he was not called to testify. The plaintiff submitted would mean that if the CM was called his evidence would be averse to the defendants, so an adverse inference for not calling him can be drawn against the defendants (s 114(g) of the Evidence Act 1950; *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 at pp 758–761; [2010] 1 CLJ 381 at pp 398–400.

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[117] I am in agreement with the plaintiff's submission on this point. The CM's evidence on the meeting with DW2 on the restricted letter would have shed light on whether the CM had instructed DW2 to reject the approved DEIA Final Report because DW2's evidence was that the state government (D2) had changed its mind on proceeding with the said project. Since the defendants did not call the CM and he was around at that time, I am entitled to invoke s 114(g) of the Evidence Act and make a finding that the CM had instructed DW2 to reject then approved DEIA Final Report.

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[118] Now coming back to the restricted letter. I am of the view paras 5–6 of that restricted letter are relevant. Let us see DW2's evidence in cross-examination:

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Q: But the DEIA final report had already done that and that was why the Federal DOE approved it. Do you accept that?

A: Yes, but ...

Roderic: I think the witness should be given a chance to explain his answer.

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Court: I allow witness to answer.

A: Yes, but as pointed out by the Director of Federal DOE in paragraph 6 of the letter of Federal DOE to the State Secretary recommending that the public objections and the need of the project as raised by the review panel to be considered by the State Government. I want to state again that the fact that on the issue of need of the project, because this involves evaluating the impact of the environment. When we talk about the need of the project we cannot look at the project in terms of it benefit only. We have to look at how is the impact to the environment. The need of the project may be sound and reasonable but the impacts of the project on the environment maybe damaging both in short terms and long term. Like I said yesterday, environment refers to the physical factors affecting the surroundings of people or human beings, the biological factors of flora and fauna and the social factors of aesthetics. In any environmental impact assessment these are the 3 main crucial environmental issues that will be studied and if the mitigating measures cannot mitigate the uncertainties or irreversible impacts of the project on environment, then the environmental impact assessment report cannot be approved.

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Q: Are you saying that the Federal DOE is wrong in approving the DEIA final report?

A A: Yes. Can I clarify when I say yes? Yes, but they left the decision or maybe I can re-word it, but they left the decision on the public objections and the need of the project to the State Government to decide. Meaning, they have not taken into account the public objections in conditionally approving the DEIA final report.

B (lines 11099–11137 at pp 492–494 NOP)

C [119] It would appear from DW2's evidence above, his decision to reject the approved DEIA Final Report was based on his reasoning that FDOE was wrong to approve the DEIA Final Report for it had failed to consider the public objections in conditionally approving the same. The plaintiff took issue on this and submitted that the evidence shows conclusively that the FDOE had in fact considered the public objections when approving the DEIA Final Report, on the 6 August 2001. The plaintiff had referred to FDOE's approval letter dated 6 August 2001 and in particular paras 3–4 (at pp 386–387 of AB2) and the enclosed attachment (at pp 393–400 of AB2) and also the fact that the restricted letter dated 6 August 2001 to the State Secretary at para 5 (p 411 of AB3) also referred to and enclosed the same attachment which have comprehensively dealt with the various impacts on the environment, assessed their impacts and imposed obligations on the developer to comply to mitigate those impacts.

F [120] When DW2 was confronted with the above contemporaneous documentary evidence, he admitted during cross-examination that the FDOE had in fact fully taken into account those objections to the environment and not only that it had expressly made those concerns as conditions for its approval:

G Q: Look at the process when you received the restricted letter on 6/8/2001. Isn't it correct that the Federal DOE approved the DEIA final report subject to conditions listed in the approval letter and the attachment?

A: Yes.

H Q: I refer to the restricted letter on pages 410 to 411 of AB3, at paragraph 5 this was so stated. Am I right?

A: Yes.

Q: You have a copy of the attachment don't you, even though it is not reproduced here in this letter?

I A: I can't remember.

Q: That attachment which you used to overturn what has been approved, are the one found on pages 393 to 400 of AB2. Do you agree?

A: Yes.

- Q: This shows that the Federal DOE had already taken into account the objections and the mitigating measures that must be put in place when the project proceeds. Do you agree? **A**
- A: I disagree, because this are only proposed mitigating measures.
- Q: They are more that propose because that they are conditions to be fulfilled. Do you agree? **B**
- A: Yes.
- Q: They must be fulfilled when the project is being implemented? **C**
- A: Yes.
- Q: I turn you now to your report of the public comment, page 308 to 310 of AB2 and I take as an example point 2.1.4. This was addressed at point condition no. 8, 9 and 10 of the conditions of approval on pages 395 to 396, am I right? **D**
- A: Yes.
- Q: If you look at the letter of approval given by Federal DOE to the Plaintiff found on pages 386 to 409 of AB2 in particular para 3 and 4 found on pages 386 to 387, you would see the reference to the condition of approval that you have just sighted and the 5 matters listed in para 4 that the project implementation must give attention during the implementation of the project. Can you confirm that? **E**
- A: Yes.
- (lines 11171–11217 at pp 495–498 NP). **F**
- [121] I have read the FDOE's approval letter together with the enclosed attachment, the restricted letter and the enclosed attachment referred to above, the defendants had put a twist or a spin on the restricted letter when all that were said by the FDOE was on whether the state government (D2) needed the project since there were some public objections. In actual fact the only issue is whether D2 would want to proceed with the project because the public objections were already dealt with by the FDOE. It would appear and which is supported by the evidence, the defendants no longer wanted to proceed with project. I am therefore in agreement with the submission of the plaintiff that there can be no justification for DW2 to reject the approved DEIA Final Report even on the case put forward by DW2, for the contemporaneous documentary evidence militates against his case. **G**
- [122] Further, DW2's action in rejecting the approved DEIA Final Report was subsequently adjudged by the COA to be unlawful. The plaintiff submitted, that the COA's judgment dated 10 November 2014 which made DW2's decision to reject the approved DEIA Final Report unlawful no longer **H**
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A binds the approved DEIA Final Report (see order at pp 802–803 of AB5). It is also the plaintiff’s submission that in cross-examination, DW2 accepted these facts (lines 10583–10589 at pp 468–469, and lines 11047–11049 at p 490 NOP):

B Q: Since your decision was quashed, as the State EPD made a decision on the DEIA Final Report up to today?

A: No, we stick to our previous decision.

Q: The previous decision no longer bind, has State EPD made another decision?

C A: No.

Q: The Court of Appeal has already ruled that your decision in rejecting the DEIA final report was unlawful. Do you accept that?

A: That is the ruling of the Court, we have to accept it.

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E [123] The defendants submitted the COA made no such findings that the Director of SEPD had abused his power and had unlawfully rejected the approved DEIA Final Report. The defendants also submitted that the COA did not re-affirm the FDOE’s earlier approval of the DEIA Final Report, but instead, it ordered the Director of SEPD to rehear the plaintiff before a decision is made on the DEIA Final Report. The defendants reproduced the order of COA:

... IT IS HEREBY UNANIMOUSLY ORDERED that:

- F** (a) The Appeal is allowed;
- (b) Order of the High Court dated 19 April 2013 is hereby set aside;
- (c) The [Director of State EPD] to hear the [Plaintiff] before the decision is made;
- G** (d) No order as to costs; and
- (e) Deposit refunded to the [Plaintiff].

(See pp 802–803 of AB5.)

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I [124] I will say this. A judicial review (JR) is a proceeding by which a court can review an administrative action by a public body and secure a declaration, order or award. This is exactly what was done by the plaintiff. The JR was filed to review the decision of the Director of SEPD in rejecting the approved DEIA Final Report without hearing the plaintiff. The High Court however dismissed the JR but on appeal the COA allowed the plaintiff’s appeal as per the order (pp 802–803 AB5). The order of the COA is very clear, the plaintiff must be heard before the Director of SEPD makes his decision. Despite the order of the COA both DW2 and D2 did not call the plaintiff for a fair hearing. They were

prepared to keep quiet. But with the decision of the COA, the approved DEIA Final Report remains valid as admitted by DW2 'That is the ruling of the Court, we have to accept it'. I am concern why D2, SAG and DW2 did nothing to initiate any hearing so that the plaintiff can be heard on why the approved DEIA Final Report should or ought to be rejected.

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[125] Having considered the evidence I agree with the plaintiff's submission that event (i) as contended by the defendants is one that they could have prevented but did not and therefore was fully at fault on its occurrence. D2 could have prevented its decision to reject by abiding with the DEIA Final Report which was already approved by the FDOE subject to the conditions stipulated in the approval, as D2 had agreed in DW2's letter to the FDOE on 13 July 2001 (pp 382–383 AB2), instead of abusing its power to decide unlawfully 14 months later. Had the approved DEIA Final Report not been rejected, the plaintiff could have moved on with the project vigorously, after all the plaintiff had ample time to do so when the DEIA Final Report was approved in 2001. I am therefore of the view the so-called frustration due to the rejection of the approved DEIA Final report is no frustration but a self-induced frustration. As I have alluded to earlier the frustration had been orchestrated by D2. I find that DW2 as the Director of SEPD had not properly exercise his discretion. In the premises I find on balance of probabilities that there is no justification in repudiation of the contract on grounds of frustration, namely the SEPD's rejection of the DEIA Final Report. I also find that the alleged frustration is self-induced.

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Section 9A of the Land Ordinance.

[126] Now we discuss event (ii), the barring of land alienation under s 9A of the Land Ordinance, which came into effect on 9 August 2012. The defendants submitted the enactment of s 9A had fundamentally affected the JVA/SA as it had prohibited the alienation of the said land which was a fundamental prerequisite for the said project under the JVA/SA. The defendants therefore submitted that the JVA/SA was frustrated and had become impossible and unlawful to be performed and thus, both the plaintiff and D1 are discharged from performing its obligation under the JVA/SA.

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[127] The plaintiff submitted, this event could have been prevented and gave two reasons. First, the amendment was pursued by D2's Bill, the Land (Amendment) Enactment 2012 (pp 560(a)–(e) of AB3). It was not an absolute barring of coastal development along the indicated coastline of Kota Kinabalu. This can be seen in Plan No 01126813, which indicated the portion of the Kota Kinabalu coastline that was barred (p 560(i) of AB3). All the parts that are excluded are seen. For instance, the present development of the Sabah Convention Centre is located on reclaimed land that was excluded from the

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- A barred coastline. The plaintiff submitted further that a sizeable portion (15%) of the said land (the project land) was excluded which was reserved as gazetted land for the Sabah Ports Authority (see P9 (1–52) at pp 46–52 and the evidence of Mr Francis Tan Kok Ping (PW6) at paras 22–23 P9 (1–52) at p 5).
- B [128] In answer to this first reason, the defendants submitted that it was the State Legislative Assembly and not D2 which had enacted s 9A to bar the alienation of seafront land along the indicated coastline of Kota Kinabalu. The defendants submitted the State Legislative Assembly is the Legislative branch whilst D2 is the executive branch (see *Tun Datu Haji Mustapha bin Datu Harun v Legislative Assembly of State of Sabah & Ors* [1986] 2 MLJ 388).
- C
- D [129] The plaintiff's second reason refers to the fact that D2 is already legally under contract, committed the said land to D1 since the letter of offer to alienate the said land had been issued, accepted, signed by D1 on 8 June 1998 and paid 50% of the required nominal premium to D2. The defendants submit, this argument is misconceived because the letter of offer cannot be looked at as a contract (*The State Government of Sabah & Ors v Clarence Chiuuh Ken Loong & Ors* [2017] 3 MLJ 127).
- E
- F [130] I have some observation to make on the role played by the State Legislative Assembly (Legislative) and the State Government (Executive). I agree with the defendants' submission that the two are separate and distinct. This is called the doctrine of the separation of powers. But to me any new legislation must first be initiated by the government then tabled in the legislative assembly, it is debated, voted upon and then passed for legislation. Which was done here in respect of s 9A. But the point is this and this is the submission of the plaintiff that D2 could have prevented this legislation if it wanted to or D2 could have excluded the said land from the effect of s 9A as it had done with the Sabah Convention Centre and Sabah Ports Authority or D2 needs not table the said Bill at all, after all that Bill would directly affect the said land which was intended for the project. But it would appear, and it is obvious, as the evidence had shown, the true intent and purport of s 9A was to ensure that the project could not proceed so that the defendants could avail themselves to the defence of frustration to avoid liability. The evidence thus supports the plaintiff's contention that this amounted to self-induced frustration.
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- I [131] As for the argument that the letter of offer cannot be looked to as a contract, I have no issue with this. I have in part addressed this in this judgment. I am however of the view that the alienation of the said land was deemed completed after the acceptance of the offer and the payment of 50% of the initial premium of RM1,000. I see no reason why D1 could not also settle the balance of the premium of RM500, after all, this is such a small amount. It can however be inferred that the defendants' conduct in not paying the balance

of the land premium showed that the defendants were delaying the implementation of the project because without the land title to the said land the plaintiff could not start the project. My finding of this delaying is supported by the D1's letter dated 5 August 1998 informing the plaintiff that D2 wanted the project to be delayed by three to five years. Such conducts of the defendants were also manifested in D1's breach of its obligation to get the land title to the said land within reasonable time and followed with DW2's subsequent rejection of the already approved DEIA Final Report by FDOE. The abuse of power through the Director of SEPD to unlawfully reject the approved DEIA Final Report so that the project cannot proceed is another strong indication that the defendants were unwilling to perform its entire obligation in the JVA/SA. And s 9A has the effect of taking away D1's right over the said land (as well as that of the plaintiff's 150 acres under the JVA/SA) and therefore not enforceable, as such legislation is not retrospective. In view of the evidence, on a balance of probabilities, the defendants have not proven frustration; but the plaintiff has proven on balance of probabilities that the two events (the rejection of the approved DEIA Final Report and s 9A) are self-induced. I therefore answer issue (ii) in the negative.

The plaintiff is entitled to damages

[132] Having so found that the defendants are liable to the plaintiff, we now discuss the damages that are recoverable by the plaintiff as well as the proof so required thereof. Both the plaintiff and the defendants have referred to s 74(1) of the Contracts Act 1950.

[133] The plaintiff claims against the defendants are pleaded in para 51 of the amended statement of claim. The plaintiff had quantified its claim for both special and general damages, particulars of which are as follows:

- (a) *loss-of-bargain damages under the JVA as varied by the SA:*
Market value of the plaintiff's 150 acres in the said land as identified in Appendix 3 of the SA – the contract price, e, the costs of construction of City Hall, Convention Centre etc on the first defendant's entitlement = plaintiff's loss-of-bargain damages => (150 acres x 43,560 sqft x RM200 per sqft) – RM160,000,000 = RM1,146,800,000;
- (b) *loss of expenditure, fees incurred, expenses and costs in carrying out the project*
Year 1998–2003 = RM6,355,371; and
- (c) *further, consequential loss of Profits expected were the plaintiff's 150 acres of commercial land to be fully developed and sold (after accounting for A and B above)*
Anticipated Total Sales Revenue – Estimated Development Cost =

- A** Profits => RM7,706,052,740 – RM1,859,263,562
= RM5,846,789,178.
And less the amounts under A and B hereinabove in mitigation of damages or prevention of double recovery => RM5,846,789,178 –
- B** (RM1,146,800,000 + RM6,355,371 = RM4,693,633,807.

[134] Now before we consider the evidence on the damages, the plaintiff had also submitted on the principles in respect of pleadings, proof of damages at trial and the award of damages:

- C** (a) as a pleading point, since the plaintiff is claiming general damages there is strictly no need to plead their basis or the amounts suffered unless the basis for the damages cannot be readily inferred (ie not obvious). Here, the plaintiff has pleaded the basis or head of damage so that the defendants are aware of the basis for each head of damages;
- D** (b) as a proof of the damages suffered, there is a need to give a basis for the claim. Here, the plaintiff had led detailed evidence on the basis of each head of damage;
- E** (c) damages may be eventually given or awarded by the honourable court in a lump sum; and
- (d) if the eventual sum of damages awarded is less than the pleaded amount, then there will be no requirement to amend the statement of claim.

- F** (see H McGregor, *McGregor on Damages* (19th Ed, London: Sweet & Maxwell, 2014) pp 1956, 1957, 1959–1960, 1937–1938, 1984).

Proof of damages under Part A

- G** [135] The plaintiff submitted Part A is the most direct damages, not remote, that would have been contemplated or reasonably foreseeable by the plaintiff and the defendants as a result of the non-performance of the contract because of the defendants' action. The plaintiff called it the loss-of-bargain damages to accentuate its direct loss arising from the failure of performance of the contract.
- H** According to the plaintiff the normal measure of damages is the market value of the 150 acres at the contractual time for completion less the contract price (see H McGregor, *McGregor on Damages* (19th Ed, London: Sweet & Maxwell, 2014) pp 931–932).
- I** [136] Despite the plaintiff pleaded case of RM1,146,800,000 as damages under Part A, the plaintiff eventually claimed only for RM472.694,495. This is the plaintiff's calculation:

Market value of the plaintiff's 150 acres in the said Land as identified in Appendix 3 of the SA — the contract price, ie, the costs of construction of City Hall,

Convention Centre etc on the first defendant's entitlement – plaintiff's loss-of-bargain damages -> ((150 acres x 43,560 sqft x RM213 per sqft) – RM759,047,505.00) – RM160,000,000.00 = RM472.694,495.00. A

[137] What is obvious from the plaintiff's claim under Part A is that the damages quantified had dropped from RM1,146,800,000 to RM472.694,495. We will discuss the details later in this judgment. B

[138] The defendants on the other hand submitted that the plaintiff would still be making a loss:

Plaintiff's pleaded Loss of Bargain	RM1,146,800,000	C
(+) MLGH's Entitlement (to avoid double deduction)	RM160,000,000	
(-) Cost to form the Land	RM1,632,198,840	
Net Loss	RM - 325,398,840	D

(Explanation:

As PW6's estimated cost to form the land has factored the first defendant's entitlement as part of his calculation, we shall remove the deduction of the RM160m which the plaintiff deducted in his pleaded loss of bargain in para 51A of its statement of claim to avoid double deduction.) E

[139] Let us consider how this revised of RM472.694,495. came about and what is the basis of the defendants' contention that the plaintiff would be making a loss of RM467,350,000. Since we would be referring to the evidence of PW6, we therefore need to discuss and consider his status since he was the expert witness called by the plaintiff to replace PW5. F

[140] The defendants had raised objection on PW6 (Mr Francis Tan) being called as a replacement expert witness and the admission of his replacement expert report which was marked as exh P9. PW6 came into the picture when it was discovered that PW5 (Mr Lee Li Chee) relied by the plaintiff to prepare an estimate of the expenditure for the plaintiff's prospective development on the 150 acres was not a registered quantity surveyor under the local statutory provisions namely the Quantity Surveyors Act 1967. From the evidence, the defendants had in fact given written notice to the plaintiff only on 12 March 2018 that PW5 is not a registered quantity surveyor. The plaintiff did nothing until 21 March 2018 when it filed its skeletal submission in reply (encl No 81). The defendants submitted that most likely the plaintiff knew that PW5 was not a quantity surveyor as far back as 3 May 2017. The defendants also submitted the plaintiff should have checked his status before engaging PW5 as an expert in this action. The defendants averred that they had been greatly prejudiced which cannot be compensated with costs as the plaintiff had been allowed to withdraw its original expert report (now layman's report) and called G
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- A PW6 to tender P9 as the plaintiff was then fully aware, through the defendants' expert report, of the defects in the plaintiff's original expert's report (now layman's report) and its pleadings which was based on the said layman's report.
- B [141] The plaintiff submitted that PW5 is a trained quantity surveyor but only that he was not a registered quantity surveyor (QS) under the Quantity Surveyors Act 1967 and that PW5 and his wife, the principal of Jurukur Bahan LM had prepared the estimates shown in P4 (1–103) at pp 8–31. The plaintiff submitted it had no knowledge and was not aware that PW5 is not registered
- C under Quantity Surveyor Act 1967 until the objection raised by the defendants. PW5 did not inform the plaintiff of his status as quantity surveyor. The plaintiff also submitted since PW5 was withdrawn as an expert witness in this trial no reliance whatsoever is placed on his Report and estimates (lines 5816–5819 p 257 NOP).
- D [142] The plaintiff submitted that the defendants' objection to PW5 as expert witness only came at this stage of the trial though PW5's report had been served on the defendants over a year ago. The plaintiff also submitted that it was still on its case (it had not closed its case yet) and had not completed calling all its
- E witnesses. Therefore, the plaintiff still can either drop a witness it had intended to call or call another witness to replace a witness he had intended to call for a specific purpose. As was the case here, the plaintiff called PW6 as an expert witness for this purpose. The plaintiff submitted the defendants have not been prejudiced as they were allowed by the court to defer cross examining PW5
- F until PW6's expert report was served on them within the court's directed time period and in fact their own expert Mr Moh (DWI) had the opportunity to study it. Mr Moh was given sufficient time by this court to prepare a supplementary expert report to comment on PW6's expert report.
- G [143] In allowing the plaintiff's application to find a replacement expert witness, I took into account that the plaintiff had served PW5's witness statement to the defendant on the 12 May 2017, nine months before the trial started, and yet the defendants only gave notice on 12 March 2018 of their
- H objection to PW5 being called as an expert witness due to him not being registered as a quantity surveyor under the Quantity Surveyors Act 1967. I am of the view that it is also part of the duty of litigants and their respective lawyers to check on the status of their respective witnesses especially witnesses who they intend to call as expert witnesses. However, I am of the vie from reading the evidence, the plaintiff could not have expected PW5 was not a registered QS
- I after all he is with Jurukur Bahan LM. I would have expected that the defendants would have known of the status of PW5 when they received PW5's witness statement and they as a matter of course should have informed the plaintiff earlier when on the status of PW5. Be that as it may, I am of the view the defendants had not been prejudiced as they were allowed to defer

cross-examining PW5 until PW6's expert report was served on defendants' own expert Mr Moh (DWI) and in fact Mr Moh had the opportunity to study PW6's expert report and he had prepared a supplementary expert report to comment on the same. In deciding the way, I did, I have also read O 40 r 1(1) of the ROC. I am of the view there is no prejudice to the defendants.

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[144] There is also the allegation by the defendants that PW6 was not an independent expert witness for the alleged reason that he attempted to overcome the weaknesses or omissions of PW5 in P4 (1–103). The defendants contended that PW6 is not impartial and unbiased and that he came to court solely to rationalize and support the plaintiff's purported claim for damages. But such contention is without basis (see para 176.1 of the defendants submission). The plaintiff submitted that PW6 had not studied P4 (1–103) until 21 May 2018 and it is impossible for him to have knowledge about the weaknesses or omissions of P4 (1–103), hence the defendants' allegation was untrue (lines 6901–6921 at pp 304–305 of NOP). I find that there is no basis for such allegation by the defendants.

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[145] Coming back to the plaintiff's damages of RM472,694,495 under Part A and the defendants' contention that the plaintiff would be making a loss of RM325,398,840.

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[146] I start with the plaintiff. The plaintiff's claim is for the 150 acres which is its entitlement had the deal gone through. In its initial claim under Part A, the plaintiff claimed for RM1,146,800,000. But there is a problem there. It was then discovered through PW6 that the said 150 acres must be formed first (the said 150 acres are under sea). The costs are substantial. Both PW6 and DW1 had given their respective estimates on the costs of reclaiming the said land. PW6's estimate given in Appendix '2' to his Report P9 (1–52) at p 9 is more extensive as it had included not just land reclamation, seawall, roads, drainage and bridges but also electrical infrastructure and sewerage system, all of which amounted to aggregate of RM743,214,880. DW1's estimate in his Report D4 (1–10) at p 8 which includes land reclamation, seawall, road reserve, drainage and bridges amounted to the aggregate of RM774,880,130. The plaintiff proposed and so submitted that an average of the PW6's and DW1's estimates be taken (RM743,214,880 + 774,880,130 and divided by 2) which works out to be RM759,047,505.0 I find this approach fair to both. And so back to the calculation bearing in mind that I have maintained the RM200 per sqft because the same was the pleaded case of the plaintiff. The calculation would be as follows: (150 acres x 43,560 sq ft x RM200 per sq ft) – RM1,306,800,000) – RM160,000,000 – RM759,047,505 = RM387,752,495. The plaintiff is therefore entitled to the sum RM387,752,495 under Part A.

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- A [147] On the defendants' submission is that the plaintiff would make a loss of RM325,398,840 or RM467,350,000 (see para 111 of encl 105 and para 65 encl 111 respectively). I think it is clear from the defendants' submission that they disputed the plaintiff's calculation of the construction costs as well as the estimated costs to form the Land. The defendants submitted the estimated the costs to form the Land is to be in the sum of RM1,632,198,840. Whereas the total construction costs of major infrastructure in October/November 2015 would be in the sum of RM1,141,620,000. The defendants also submitted that the costs of constructing the cofferdam in forming the said land should also be paid by the plaintiff. The defendants had referred to second page of Appendix 2 (exh P9 (9–10)) and the plaintiff's Replacement Expert Report (P8(8)). In respect of the cofferdam the defendants referred to DW1's supplementary Expert Report (D1A).
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- D [148] The plaintiff's submitted that the defendants' allegation is fallacious and misleading. The plaintiff had referred to Section I in Appendix '1' on p 8 of P9 and submitted that the sum of RM1,632,198,840 referred to the estimated total development cost of the project which consisted of the Total Development Cost (more particularly in Appendix 2 of SA), the holding cost at 8%pa (for 17 years if completed in 1998), and the costs for promotion, marketing and administration. The plaintiff therefore submitted that this sum RM1,632,198,840 is the total development costs of the project (ie including the completion of the first defendant's entitlement) if it were completed in 1998 and the plaintiff were to hold onto to it 17 years until date of assessment in October 2015 at 8%pa.
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- G [149] According to the plaintiff the defendants' assessment of damages where they alleged the plaintiff would in fact make a loss (para 111 of encl 105 and para 65 encl 111 respectively) is flawed for the defendants had taken calculations meant for PW6's Option 1 for which the plaintiff does not claim in this action. For the purpose of the plaintiff's claim, the plaintiff preferred PW6's estimate of RM743,214,880 as costs for reclamation, seawall, roads, drainage and bridges but also electrical infrastructure and sewerage system (Appendix '2' to his Report P9 (1–52) at p9). In any event PW6's estimation is also close to the estimation of DW1 which amounted to RM774,880,130 (report D4(1–10) at p 8). The plaintiff then took the average of the PW6's and DW1's estimates which worked out to be RM759,047,505. The latter is taken as the costs to form the said land.
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- I [150] On the cofferdam costs. The defendants mentioned that the plaintiff did not consider the cost of constructing a cofferdam in forming the said land. However, PW6 had testified that a cofferdam is not a requirement to form the said land for the project (lines 6108–6114 at p 268 NP):

Q14: Is a cofferdam necessary for the formation of the land in this project?

A14: There is no such requirement for this project. I refer to the DEIA Final Report in AB6 at paragraph 3.6.1 at p 3-17 which only stipulated 'a containment structure (bund) will be constructed along the finalized reclamation boundary'. A Seawall as envisaged in the Total Development Costs will be a part of the containment structure (bund) and will be sufficient.

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[151] Since the DEIA Final Report did not insist on the construction of cofferdam, there was no necessity for the plaintiff to do so.

[152] In the upshot the plaintiff had proven its claim for damages under Part A. The plaintiff had prayed for RM1,153,155,371 or to be assessed. After going through the evidence, the court allowed damages of RM387,752,493.

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Proof of damage under Part B

[153] The plaintiff's claim is for RM6,355,371. The plaintiff submitted that this part of the damages is for the plaintiff's loss in expenditure, fees incurred, expenses and costs in carrying out the project under the JVA/SA from 1998 until 2003 as follows:

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Year	Amount
1998	RM2,182,346
1999	RM1,886,089
2000	RM841,167
2001	RM777,406
2002	RM438,008
2003	RM230,355
Total	RM6,355,371

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[154] To prove its claim, the plaintiff had referred to the audited financial accounts for each of the year 1998 until 2003 as verified by the plaintiff's auditor Ernst and Young (the auditors) (see pp 804–921 of AB5). The plaintiff had also referred to the plaintiff's own ledgers and accounting records which showed a further breakdown of those figures (see pp 616–662 of AB3). All the evidence is contained in PW1's evidence-in-chief (see lines 790–804 at p 30 NOP). The plaintiff submitted that since this was not challenged by the defendants during cross-examination, the same is considered accepted as evidence (see *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639).

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[155] The defendants submitted the plaintiff had failed to prove this head of damages. The defendants have taken issue on the plaintiff not calling the maker of the audited financial accounts to prove the contents thus depriving them of the opportunity to cross-examine the auditors. The defendants had referred to

A *Prai Power Sdn Bhd v Malayawata Steel Berhad* [2013] 1 LNS 1530.

B [156] The plaintiff submitted *Prai Power* ‘... should be distinguished from the facts of this suit considering that the damages under Part B of Paragraph 51 is related to actual work done by the plaintiff in carrying out the project and for which PW1 had given evidence which was indisputable’.

C [157] Now what are the actual works done and were they really done by the plaintiff for the project and only for the project. That is exactly in the minds of the defendants. It is a matter of proof. I therefore must look at the evidence. The plaintiff started with this. The plaintiff was specially director and he was personally involved in the project (see para 4 PS). The plaintiff had put tremendous efforts in performing the main works of JVA/SA, as seen in the various approvals from the relevant government authorities they have sought (see paras 140 to 142 of PS) and the achievements of which are shown by the design plans and reports (see AB4 and AB6). I am of the view all these required expenses. The plaintiff had provided the summary of expenses incurred (from year 1998 until 2003) (see para 244 of PS).

E [158] All those expenses would have been audited by the plaintiff’s auditors. The details are all there in the audited financial accounts. Further the plaintiff had also referred to the plaintiff’s own ledgers and accounting records which showed a further breakdown of those figures. All the information involving those expenses must surely have been supplied by PW1 to the auditors. PW1 in cross-examination testified that all expenses incurred are for the project: ‘Rainbow Bay Sdn Bhd set out to do only this project and nothing else.’ (see lines 2937–2942 at pp 127–128 NOP). I therefore agree with the plaintiff that PW1 is the best witness to testify on the expenditure and expenses incurred in carrying out the project according to the JVA/SA apart from the maker of the audited financial statements.

H [159] Now it is up to court to determine at the end of the whole case whether the claim under this head had been proved. The plaintiff submitted it is the court’s discretion to decide the evidential weight of the contents of the documents based on the evidence that is given to prove the contents (see *Jaafar Bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509 at p 521, SC and *Mohd Nazari bin Ab Majit v Tan Keo Hock & Anor* [1998] MLJU 382; [199] 1 CLJ 601).

I [160] I see no issue on the authenticity of the audited finance statements since the same are admitted (see pp 804–921 of AB5). The plaintiff’s own ledgers and accounting records which showed a further breakdown of those figures are also admitted (see pp 616–662 of AB3). These documents being part of the

agreed bundle (are authentic and are in existence), do not require proof of by calling the makers although the truth of the contents are liable to be challenged in court. These documents were referred to by PW1 who had knowledge of the contents, the defendants should have cross-examined PW1 on their truth or the specific part of his evidence. But this was not done. The plaintiff submitted the defendants cannot then raise the issue of the contents of the audited finance statements in their submissions for PW1 would not have had an opportunity to answer or explain the allegation (see *Aik Ming (M) Sdn Bhd* at pp 794–795 (MLJ); p 659 (CLJ)).

[161] Having read the audited financial statements (see pp 804–921 of AB5) and the plaintiff's own ledgers and accounting records which showed a further breakdown of those figures (see pp 616–662 of AB3) and having read the parties' respective submissions it is my view that the plaintiff has on a balance of probabilities proven its claim for RM6,355,371 against the defendants.

Proof of damages under Part C

[162] The plaintiff claims under Part C is in the sum of RM1,588,654,246 (computed as RM2,067,704,112. less Parts A and B). The claim is for further consequential loss of profits expected under the JVA/SA if the plaintiff were to have developed its intended 150 acres of commercial land as demarcated in Conceptual Master Development Plan (CMDP). The intended development comprised of Lot A1, Lot A2, Lot A3, Lot A4, Lot A5, Lot B1, Lot B2, Lot C1, Lot C2, Lot C3, Lot C4 and Lot C5 as all shown, together with their individual acreage, in Appendix 3 of the SA, into a mixed commercial development of the following: four-storey, six-storey, seven-storey and eight-storey shops/offices; 16-storey hotel; 20-storey and 22-storey condominiums; corporate lots; complete with promenade, car parks, and public utilities (see CMDP (at p 642 of AB4) and the detailed draft Development Plan, DP01 (p 779 of AB4). The plaintiff submitted this development would have been undertaken if the first defendant had not repudiated and breached the contract that resulted in the termination of the contract.

[163] I have read the parties' submissions on this Part C of the plaintiff's claim. There is issue on whether there was already an approved development plan in respect of the 150 acres. The defendants submitted there is none, and so the claim of the plaintiff is too remote, speculative, and academic. We will now consider the evidence, only then we consider whether the plaintiff is entitled to claim the said sum of RM1,588,654,246.

[164] The plaintiff relied on the evidence of PW6 who had prepared the replacement expert report (P9). PW6 had prepared the P9 based on a draft development plan of the plaintiff's 150 acres which is as shown in DP01. It is

A also PW6's testimony that DPO1 was a draft development plan (p 779 of AB4). PW6 testified that there was no problem for the draft development plan DP01 to be approved as it has allegedly complied with the purported approved plot ratio provided in the CMDP found in p 642 of AB4.

B [165] Dr Adrian Chong Sui Chiang (PW2), the former Director of Town and
Country Planning, gave evidence that there was this Conceptual Master
Development Plan (CDMP) which he said is an approved Master
Development Plan for the project. He had also referred to the draft
development plan DP01 (p 779 AB4) and it was his view that the land use of
C the development in DP01 is consistent with the approved CDMP. He further
said that there is every likelihood that it would be approved by MPKK but
whether it would be approved was up to MPKK. He is non-committal on the
status of DP01. I am of the view his evidence corroborated PW6's evidence that
D DP01 was only a draft development plan.

E [166] DW3, who was the then Chief Engineer of MPKK (now DBKK) in
charge of development control and maintenance of public infrastructures gave
evidence that the CMDP (at page 642 of AB4), was the only approved plan in
this present action but that there were no buildings shown in any of the lots
stated therein because the sole purpose of a CMDP is to confirm the broad
patterns of development and land use (lines 11631–11635 NOP). DW3 had
described how an approved development plan is approved by DBKK. He
testified 'A Development Plan for the project is normally submitted and
F approved. After which, the Building Plan for the project will also be required to
be submitted and approved followed by Structural Plan and
Infrastructure/Engineering Plan' (lines 11605–11609 NOP).

G [167] DW1, the defendants' expert witness had produced his expert report
D4 (1–10) and during the trial he said that PW6's expert report based without
an approved development plan, building plan and infrastructure/engineering
plan 'is at best speculative and academic and of limited use' and 'may only be
useful for the developer's own personal consumption'. (see evidence-in-chief at
pp 407, 412–414 and lines 9153–9218 NOP).

H [168] Arising from the above, the defendants submitted that the Replacement
Expert Report (P9) is prepared based on a lot of assumptions being made which
would render the report to be highly remote and uncertain and as such the
plaintiff had not proven its claim under this heading.

I [169] After going through the evidence I am entirely in agreement with the
defendants' submission that the plaintiff had on the balance of probabilities
failed to prove its claim against the defendants. Here are my reasons. PW6
prepared his Replacement Expert Report (P9) based on DPO1 which he

admitted being a draft development plan. PW6 said he believed the DPO1 would be approved but PW2 said it may or may not it depend on MPKK (now DBKK). DW3 however said the detail development plan has to be submitted to the DBKK for approval. There is no evidence to support that the plaintiff had submitted this draft development plan (DPO1) which had been approved by DBKK (previously MPKK). It is also in evidence that the plaintiff prepared this draft development plan (DP01) in 2015 for the sole purpose of claiming damages in this suit. This was freely admitted by PW1 during the cross-examination at this trial (see cross-examination of PW1 lines 1922–1932 NOP). So, how then can PW6 prepare his Replacement Expert Report (P9) when it is based on a draft development plan not approved by DBKK (the local authority). Surely P9 would be based on assumptions. The defendants submitted the report is highly remote and uncertain. I agree, it is what it is. In the circumstances the court disallowed this part of the plaintiff's claim.

CONCLUSION

[170] In the upshot the plaintiff has on the balance of probabilities proven its claim against the defendants on issues (i), (ii) and (iii) but not (iv). I therefore allow damages of RM394,107,866 (Part A and B), interest at the rate of 5%pa from 10 October 2015 until full payment and costs of RM100,000 subject to allocator fees.

Order accordingly.

Reported by Ahmad Ismail Illman Mohd Razali

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